

1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF MINNESOTA

3 Case No. 19-33190-wjf

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5 In the Matter of:

6
7 MARY JANE RYAN,

8
9 Debtor.

10 - - - - - x

11
12 United States Bankruptcy Court

13 316 North Robert Street

14 St. Paul, MN 55101

15
16 September 30, 2020

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21 B E F O R E :

22 HON WILLIAM J. FISHER

23 U.S. BANKRUPTCY JUDGE

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25 ECRO: UNKNOWN

1 HEARING re Court's decision.

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2
3 PROTEGO LAW PLLC

4 Attorneys for Edward Russell

5 1805 North Scottsdale Road

6 Scottsdale, Arizona 85281

7
8 BY: DANIEL E. GARRISON (TELEPHONICALLY)

9
10 UNITED STATES DEPARTMENT OF JUSTICE

11 Attorneys for The United States Trustee

12 316 N. Robert Street

13 St. Paul, MN 55101

14
15 BY: COLIN KREUZIGER (TELEPHONICALLY)

1 P R O C E E D I N G S

2 CLERK: Good Morning. We're going to
3 go on the record in the Mary Jane Ryan matter,
4 19-33190. This is on a motion to avoid a -- the
5 agreements. Let's me get the appearances for the
6 record. Do I have Mr. Kreuziger on the line for
7 the U.S. Trustee?

8 MR. KREUZIGER: Yes, Your Honor. Good
9 morning.

10 THE COURT: Good morning. Do I have a
11 Mr. Garrison on the line for Mr. Russell?

12 MR. GARRISON: Yes, Your Honor. Good
13 morning.

14 THE COURT: Do I have anyone else on
15 the line who wishes to make an appearance?

16 Okay. In that case, I'll start. Let
17 me go through a couple of rules, I suppose,
18 first. Please put your phones on mute. You
19 won't be doing any talking during the point --
20 during the part that I'm reading the decision.

21 Also, please do not interrupt me during
22 the decision. If you have -- I will ask -- I
23 will give you a chance to talk at the end of the
24 hearing. Not to argue with the decision, but
25 rather to -- if there's any clarification. Is

1 there anything else you need to know but we can
2 deal with it at the end.

3 So, I appreciate that. And with that,
4 I will start. And I -- the parties know what's
5 in dispute here, it's basically Mr. Russell's
6 fees of \$2000 post-petition.

7 I will file findings of fact -- I will
8 not read those -- I will file the findings of
9 fact later today. Along with the -- with a very
10 brief order. What I'm going to read on the
11 record will be incorporated into the final
12 decision in the order itself.

13 As well the findings of fact. And I
14 will also file a list of the cases that I cite so
15 if I miscite a case here, or you -- I'm talking
16 too quickly and you can't write it down quickly
17 enough, it will -- you will see the name of the
18 case in the list that I will file also today.
19 So, all those will be filed by the end of the day
20 today. With that, here's my decision.

21 The fees allowed to Mr. Russell are
22 reduced to \$1285.50 for the reasons stated today.

23 Since the U.S. Trustee has not argued
24 that bifurcated fee agreements in Chapter 7
25 consumer cases are per se impermissible, I will

1 not address that issue.

2 Further, I'm not considering the
3 enforceability of the fee arrangement as the
4 parties agree that issue is not performing at
5 this time.

6 Thus, I'm not deciding whether the
7 post-petition payment lack consideration as local
8 rules require full representation once an
9 attorney appears in the case, as Mr. Russell did
10 when he filed this case.

11 Whether the obligation of Ms. Ryan to
12 pay Mr. Russell is really a pre-bankruptcy
13 agreement subject to discharge, or any other
14 issue regarding enforceability of the agreement.

15 These issues can be raised by Ms. Ryan
16 should she chose to do so and can be dealt with
17 at that time.

18 Further, I'm not considering the effect
19 of Mr. Russell's personal Chapter 13 bankruptcy
20 case, which is pending before me, and the effect
21 of that case on the agreement he entered into
22 with Fresh Start Funding without court approval
23 after he filed bankruptcy in 2017.

24 The only issues before me are whether
25 Mr. Russell's fees should be disgorged or

1 disallowed in their entirety or reduced as
2 excessive.

3 That is also one of the principal
4 reasons why I'm not doing a written opinion --
5 because this -- I don't want it floating around
6 as some kind of pronouncement that would have any
7 effect other than this case.

8 I. Mr. Russell's fees are excessive
9 under Section 329(b) of the Bankruptcy Code. The
10 U.S. Trustee argues the court should cancel the
11 pre-petition and post-petition agreements between
12 Mr. Russell and Ms. Ryan under Section 329(b)
13 because the agreements were not in Ms. Ryan's
14 best interest.

15 Mr. Russell's compensation is
16 excessive, and his disclosures under 329(a) were
17 inadequate. That Docket No. 30 -- and these are
18 their arguments -- Docket No. 30 at 98, Docket
19 No. 53 at 19.

20 Section 329 provides (a) any attorney
21 representing a debtor in a case under this title,
22 or in connection with such a case, whether or not
23 such attorney applies for compensation under this
24 title, shall file with the court a statement of
25 the compensation paid or agreed to be paid, if

1 such payment or agreement was made after one year
2 before the date of the filing of the petition,
3 for services rendered or to be rendered in
4 contemplation of or in connection with the case
5 by such attorney, and the source of such
6 compensation.

7 (b) If such compensation exceeds the
8 reasonable value of any such services, the court
9 may cancel such agreement, or order the return of
10 any such payment, to the extent excessive.

11 Most courts have declined the whole
12 bifurcated fee agreements per se impermissible.

13 See for example in re Carr, 613 B.R.
14 427 at 441 to 442. The Bankruptcy Eastern
15 District of Kentucky, 2020.

16 Here, the U.S. Trustee cites recent
17 case law from other Bankruptcy Courts considering
18 the propriety of such arrangements including in
19 re Milner, 612 B.R. 415, Bankruptcy Western
20 District of Oklahoma, 2019.

21 In re Wright, 591 B.R. 68, Bankruptcy
22 Northern District of Oklahoma, 2018. And in re
23 Hazlett, Number 16-30360, 2019 Westlaw 1567751,
24 Bankruptcy District Utah, April 10, 2019.

25 The U.S. Trustee argues this case

1 provide an analytical framework for evaluating
2 the reasonableness of bifurcated -- the
3 agreements. Under these approaches, I should
4 cancel Mr. Russell's fee arrangements. That's
5 Docket number 30 at 100.

6 The U.S. Trustee cites the following
7 for "prime directive" announced in Hazlett for
8 considering the propriety of any particular
9 bifurcated agreement.

10 1. And this is a quote -- "other than
11 deciding whether to represent a debtor, all
12 dealings, and decisions, including the offered
13 methods of payment must be based on the client's
14 best interest, and that the lawyers financial
15 interest.

16 2. All fees for legal services,
17 including any finance charge and installment
18 payments must be reasonable and necessary.

19 3. All fee arrangements must be fully
20 revealed in the statement of compensation which
21 must be filed within 14 days of the petition.

22 4. The client elects to proceed pro se
23 or to retain the services of another lawyer. The
24 filing attorney must immediately comply with
25 local rule regarding the substitution or withdraw

1 of counsel." That's Hazlett 2019, Westlaw
2 1567751 at pages 9 through 10. See also Milner
3 612 B.R. at 432 to 33.

4 Further, the Hazlett Court stated that
5 "fees for post-petition services should not be
6 directly or surreptitiously slipped into the fee
7 charged for post-petition services." Hazlett at
8 page 9.

9 In Hazlett, the Court granted some
10 rejudgement in favor of the debtor's attorney.
11 That's on page 14.

12 The U.S. Trustee also cites two
13 additional concerns and in discussion of the Ryan
14 case including:

15 1. The attorney's failure to list in
16 the disclosure of compensation all aspects of the
17 fee splitting arrangement.

18 2. Clients who use the zero money down
19 option with fees factored ended up paying 25
20 percent more than those who paid the retainer up
21 front.

22 3. The improper shifting of most, if
23 not all the fees, to the post-petition fee
24 arrangement, or a conflict of interest in both
25 creating a non-dischargeable debt for the use of

1 a post-petition fee agreement, and a conflict
2 arising from the attorney's desire to maintain a
3 favorable relationship with the factoring entity
4 while representing the client. Hazlett at 11 and
5 12 discussing Wright 590 B.R. 89 through 99.

6 The Hazlett decision involved a
7 factoring company with debtors counsel signing
8 the right to collect the attorney's fees and cost
9 in exchange for an immediate receipt of 75
10 percent of the total amount from the factoring
11 company. Hazlett at 11.

12 Here, on the other hand, Fresh Start
13 Funding's approach involves the extension of a
14 line of credit to Mr. Russell, as opposed to the
15 strict assignment of Mr. Russell's right to
16 collect fees from Ms. Ryan. Docket Number 30 at
17 101.

18 The Bankruptcy Court for the Western
19 District of Oklahoma recently considered Fresh
20 Start Funding's specific business model in the
21 Milner case. The U.S. Trustee argues that the
22 facts in the Milner case track closely with the
23 facts in Ms. Ryan's case. Docket number 30 at
24 101.

25 In Milner, the debtor's attorney

1 entered into a line of credit with Fresh Start
2 Funding. That's Milner at 422.

3 The terms in the line of credit
4 agreement in Milner appear to be substantially
5 similar to, or the same, as the terms in this
6 case. Milner at 422 to 23.

7 The debtor's attorney then entered into
8 pre-petition and post-petition agreements with
9 the debtor. Milner at 423 to 26.

10 The debtor paid \$300 in attorney's
11 fees. And the \$335 case filing fee prior to the
12 filing of her bankruptcy petition. Milner at 424
13 to 425.

14 In Milner, the debtor's attorney
15 entered into a post-petition agreement the day
16 after the bankruptcy was filed that required the
17 debtor to pay \$2400 for post-petition services.
18 Milner at 425 to 26.

19 The Milner Court voided the pre-
20 petition and post-petition agreements and ordered
21 the debtor's attorney and Fresh Start Funding to
22 have no further contact with the debtor. That's
23 Milner at 443 to 44.

24 The U.S. Trustee argues that chief
25 among the Milner's -- Court's concerns were the

1 following:

2 1. It was not in the debtor's best
3 interest to enter into the bifurcated fee
4 agreement because the debtor could not afford to
5 make the payments to Fresh Start Funding.

6 2. The debtor -- debtor's attorney's
7 disclosures under Rule 2016(b) were inadequate.

8 3. The debtor's attorney charged 50 to
9 80 percent more than he did in cases that did not
10 involve bifurcation.

11 4. The pre-petition and post-petition
12 agreements violated Section 528 of the Bankruptcy
13 Code. See Milner at 433 to 443.

14 Holding that the bifurcated agreements
15 in Milner did not satisfy the standards set by
16 Hazlett.

17 The U.S. Trustee argues that the Milner
18 case exemplifies the most recent decision to
19 consider bifurcated fee structures. That's
20 Docket number 30 at 102.

21 Further, the U.S. Trustee contends that
22 Milner dealt with facts that are most similar to
23 the facts in Ms. Ryan's case. Docket number 30
24 at 102.

25 Therefore, the U.S. Trustee concludes

1 that this Court should reach the same result as
2 the Milner Court for the same reasons. Docket
3 number 30 at 102.

4 Counsel for Mr. Russell indicates that
5 Milner is under appeal. That's Docket number 34
6 at 1.

7 A. The U.S. Trustee's best interest
8 analysis fails to show that the retainer
9 agreement should be cancelled. The U.S. Trustee
10 argues Mr. Russell's agreements with Ms. Ryan
11 were not in Ms. Ryan's best interest. Docket
12 number 30 at 102. Docket number 53 at 19.

13 The U.S. Trustee contends that, as in
14 Milner, Ms. Ryan's means are very limited.
15 Docket number 30 at 102. Docket number 53 at 19.

16 In support, the U.S. Trustee points to
17 the fact that Ms. Ryan is 73 years old, retired,
18 and her income currently consists entirely of
19 Social Security benefits of \$1679 per month.
20 Docket number 53 at 19.

21 Further, Ms. Ryan's total gross annual
22 income is less than \$20,000.

23 U.S. Trustee argues that even more
24 egregious is the fact that Ms. Ryan's schedule in
25 that income was negative when Mr. Russell filled

1 her case. Docket number 53 at 19.

2 Further, the U.S. Trustee maintains
3 that the only reason Ms. Ryan can afford to make
4 the payments to Fresh Start Funding is that she
5 is living with a friend who does not charge her
6 rent. Docket number 53 at 19 to 20.

7 While this is true, her rent would have
8 been nearly 80 percent of her income. \$1340 in
9 rent over \$1679 in monthly income at the time of
10 her deposition. Clearly, she needed to reduce
11 her rent regardless of the \$100 monthly
12 obligation to Mr. Russell.

13 She also clearly stated that if she
14 started renting again, she could afford rent and
15 the \$100 payment as the Ryan deposition
16 transcript 100 -- page 112, 1 through 24. No
17 contrary evidence was produced by the U.S.
18 Trustee.

19 The U.S. Trustee further argues that
20 the value of Ms. Ryan's discharge remains
21 questionable. Docket number 30 at 103. Docket
22 number 53 at 20 to 21.

23 In support of this argument, the U.S.
24 Trustee notes that Ms. Ryan listed \$3200 in
25 assets that are except from collection under

1 state law. With the exception of \$200 in Ms.
2 Ryan's checking account. That's stipulation
3 paragraph 21. See Minnesota Statute 550.37 subd.
4 4(a) through (b).

5 Further, a majority of Ms. Ryan's debt
6 -- educational loan -- was not discharged in her
7 bankruptcy. See 11 USC Section 523 (a)(8).

8 Nevertheless, Ms. Ryan had roughly
9 \$22,277 in debt that has been discharged. That's
10 Ryan deposition transcript page -- transcript
11 pages 94 line 25 to 95 line 3.

12 Thus, there was significant debt to be
13 discharged. The U.S. Trustee also argues that
14 Ms. Ryan's earnings and Social Security Benefits
15 are also exempt from garnishment because she was
16 earning less than the federal minimum wage. See
17 42 USC Section 407(a). Minnesota Statute
18 571.922(a).

19 However, these were only except if an
20 exemption form for Minnesota Statute Section
21 571.922 is filled out by a debtor when garnished,
22 which can be difficult, burdensome, and stressful
23 for a debtor.

24 Further, dealing with creditors can be
25 very difficult. See Russell deposition

1 transcript page 133, line 11 to 134, line 8.

2 The U.S. Trustee maintains there was
3 little, if any, evidence on the record that Mr.
4 Russell explained to Ms. Ryan how little
5 practical relief bankruptcy could afford her.
6 Docket number 53 at 20.

7 For example, the U.S. Trustee argues,
8 there's no evidence that Mr. Russell explained to
9 Ms. Ryan that bankruptcy would not excuse her
10 from paying rent or -- it would not enable her to
11 keep her car without making her car payments.
12 Docket number 53 at 20.

13 And according to U.S. Trustee, there is
14 little, if any, evidence that Mr. Russell
15 explained that even without bankruptcy, Ms.
16 Ryan's creditors could not attach her assets or
17 garnish her wages. Docket number 53 at 20.

18 However, Ms. Ryan testified that Mr.
19 Russell told her Social Security benefits and
20 income could not be garnished. That's the Ryan
21 deposition 95, lines 9 to 3.

22 And as previously discussed, Ms. Ryan
23 will need to file exemption forms which many
24 debtors fail to complete. The U.S. Trustee
25 concludes that Mr. Russell advised his client to

1 incur purportedly non-dischargeable obligation to
2 pay \$2335 in order to get a discharge of
3 questionable value. Docket number 53 at 20 to
4 21.

5 Yet Ms. Ryan did testify that her debts
6 were causing stress and her stress has now been
7 relieved.

8 The U.S. Trustee also maintains that
9 Mr. Russell did not appear to have made any
10 serious attempt to advise Ms. Ryan of these
11 facts. And he stated that he does not assist
12 clients in negotiating with creditors. Docket
13 number 53 at 21.

14 Mr. Russell also failed to advise Ms.
15 Ryan that she could seek pro-bono assistance in
16 filing her case or that she could seek a waiver
17 of the Chapter 7 filing fee despite his knowledge
18 that Ms. Ryan could not afford to pay even the
19 bankruptcy filing fee before her case was filed.
20 That's Ryan deposition transcript 99, lines 18
21 through 25. Russell deposition transcript 117,
22 line 2 to 118, line 1.

23 The U.S. Trustee argues that Ms. Ryan
24 was desperate. She relied on Mr. Russell's
25 judgement as an attorney and she was not properly

1 advised as to all her options. Docket number 53
2 at 21.

3 While it is true that he could have
4 recommended pro-bono assistance, the U.S. Trustee
5 offered no evidence on her qualifications for
6 pro-bono assistance by providers.

7 Mr. Russell testified that filing
8 through a pro-bono provider can take some time as
9 he has taken pro-bono cases. Russell deposition
10 transcript 117, line 20 to 118, line 1; and 180,
11 lines 18 through 25.

12 According to the U.S. Trustee, Mr.
13 Russell also failed to minimally advice Ms. Ryan
14 that there were, at a minimum, serious issues as
15 to whether Mr. Russell had a significant conflict
16 of interest and was putting his own and Fresh
17 Start's interest above his clients. Docket
18 number 53 at 21.

19 The U.S. Trustee further maintains that
20 Mr. Russell did not advice Ms. Ryan that there
21 were significant arguments that the entire fee
22 was dischargeable because it was really agreed to
23 pre-petition and was merely formalized post-
24 petition in an attempt to attempt the discharging
25 junction. Docket number 53 at 21.

1 The U.S. Trustee notes that Mr. Russell
2 and Fresh Start Funding's agreements with Ms.
3 Ryan committed her to pay -- to payments of \$100
4 per month for almost two years. Russell
5 deposition Exhibit 5 at page 73.

6 This was \$500 more than Mr. Russell's
7 standard fee. Russell deposition transcript 30,
8 lines 4 through 12. 147, lines -- line 19
9 through 148, line 5.

10 U.S. Trustee argues that Ms. Ryan
11 cannot afford the payments and all of virtually -
12 - all of her assets and income were exempt from
13 collection efforts. Docket number 30 at 103.

14 Further, a vast majority of Ms. Ryan's
15 debt was not discharged in new bankruptcy. See
16 stipulation paragraph 21.

17 According to the U.S. Trustee, it is
18 solely the grace of a friend that allows Ms. Ryan
19 to pay Fresh Start Funding at all. However, Ms.
20 Ryan testified that if needed, she could pay for
21 rent and \$100 per month under the fee agreement.
22 Ryan deposition transcript 112, 1 through 24.

23 The U.S. Trustee maintains that like
24 Milner, it was not in Ms. Ryan's best interest
25 entering into the agreements with Mr. Russell.

1 And the agreement should be cancelled under
2 Section 329(b).

3 Further, the U.S. Trustee argues that
4 unlike Milner, there was no compelling exigency
5 that required Ms. Ryan to file her bankruptcy
6 case. Docket number 53 at 22.

7 The U.S. Trustee also contends that
8 utilizing the asset approach does not yield
9 different results because Hazlett also requires
10 consideration of the debtor's best interest.

11 Therefore, the U.S. Trustee concludes
12 this Court should cancel the agreements.

13 In this case, Ms. Ryan felt financial
14 stress and had debts. And she had experience
15 from her prior bankruptcy in 2001 -- 2009, excuse
16 me.

17 Despite she knew most of her debt was a
18 student loan that wouldn't be discharged, Ms.
19 Ryan went to file a Chapter 7 case to lessen her
20 financial burden and stress by discharging
21 \$22,277 in debt.

22 Ms. Ryan testified that this stress is
23 much less since she was able to file bankruptcy.

24 Further, as in her prior case, Ms. Ryan
25 attested that her monthly expenses exceeded her

1 income, this time by approximately \$600. Despite
2 this, since her bankruptcy filing, Ms. Ryan has
3 been able to eliminate her rent by staying with a
4 friend.

5 When she does move out, she believes
6 she can afford rent and the \$100 monthly payment
7 under the fee agreement.

8 At the time of her deposition in May of
9 2020, she had made the payments in full and on
10 time. She had debts of \$22,277 that were
11 discharged and has less stress now.

12 Attorneys are not required to take pro-
13 bono cases or refer to pro-bono providers. If
14 that were the legal standard, numerous cases in
15 this district, and nationally, would have to be
16 reevaluated.

17 Further, such pro-bono services are not
18 unlimited. There's no evidence as to whether Ms.
19 Ryan would even qualify for pro-bono assistance
20 or what kind. There is evidence for Mr. Russell
21 that a pro-bono case can take a while. I will
22 not require attorneys to explore pro-bono actions
23 in -- prior to filing bankruptcy unless they
24 still choose to take the case pro-bono.

25 The conflicts the U.S. Trustee

1 discusses exist in many cases. And Ms. Ryan was
2 given the option to confer with another attorney.
3 Mr. Russell acted as most attorneys would in this
4 case by taking whatever legal action for the
5 bankruptcy that was being asked of him.

6 Attorneys have an interest in
7 completing legal actions requested. There's no
8 evidence that Mr. Russell pushed Ms. Ryan into
9 bankruptcy to get paid.

10 Ms. Ryan is intelligent, understood the
11 process as she's filed bankruptcy before, felt
12 stress and she wanted to file bankruptcy. I will
13 not hold that Ms. Ryan cannot file for bankruptcy
14 and the attorney must take case pro-bono.

15 Even if her assets were all exempt from
16 collection -- what we call collection proof --
17 she still would be required to complete paperwork
18 to stop collection activity and deal with her
19 creditors, which as Mr. Russell testified can be
20 complicated and cause stress.

21 Mr. Russell believed that the fee is a
22 post-petition obligation and not a discharge.
23 The U.S. Trustee did not show that he had an
24 obligation to tell his client he could be wrong
25 in this conclusion.

1 However, as part of this decision, Mr.
2 Russell must show Ms. Ryan the order -- which
3 will be entered later today -- which clearly
4 states that this issue has not been decided and
5 might be available to her.

6 Therefore, the U.S. Trustee's best
7 interest analysis fails to demonstrate the
8 retainer agreement should be completely cancelled
9 under Section 329(b) -- B.

10 Mr. Russell's inaccurate 2016 lead
11 disclosures do not warrant disgorgement of fees.

12 The evidence is clear that the errors
13 in the disclosures were unintentional. Section
14 329(a) of the Bankruptcy Code requires an
15 attorney for the debtor to file -- "file with the
16 Court a statement of the compensation paid or
17 agreed to be paid for services rendered or to be
18 rendered and the source of such compensation."

19 Rule 2016(b) requires the statement for
20 Section 329 to include, "whether the attorney has
21 shared or agreed to share the compensation with
22 any other entity. The statement shall include
23 the particulars of any sharing or agreement -- to
24 share by the attorney."

25 Local rule 1006-1 states "the statement

1 of compensation shall conform substantially to
2 local form 1007-1."

3 Schroeder v. Rouse (In re Redding), 263
4 B.R. 874 at 878 8th Circuit Bankruptcy Appeal
5 Panel 2001. The 8th Circuit B.A.P. recognize,
6 "when an attorney files a bankruptcy case on
7 behalf of a debtor, Section 329 requires the
8 attorney to submit a specific statement of the
9 compensation paid or agreed to be paid for the
10 services already rendered or to be rendered."

11 Excuse me.

12 "The statement filed pursuant to the
13 guidelines established by Rule 2016, in this
14 instance, further delineated by local rule, must
15 be filed. The Code and Rules requires without
16 exception, the amount and source of the
17 compensation be disclosed."

18 This provision is derived in large part
19 from the Bankruptcy Act and reflects Congress'
20 concern that payments to attorneys in the
21 bankruptcy context might be the result of evasion
22 of creditor protections and provide the
23 opportunity for overreaching attorneys."
24 Redding, 263 B.R. 878.

25 The Bankruptcy Court has the broad

1 power and discretion to award or deny fees.
2 That's from Karsch v. LaBarge -- B-A-R-G-E -- in
3 re Clark, 223 F.3d 859 and 863 (8th Circuit
4 2000). "And it's well settled that disgorgement
5 of fees as appropriate -- is an appropriate
6 sanction for failure to comply with the
7 disclosure requirements of Section 328 and Rule
8 216."

9 Redding 263 B.R. 880 affirming
10 disgorgement based on failure to disclose.
11 "Negligent or inadvertent admissions -- quote --
12 do not vitiate the failure to disclose."

13 Jensen v. United States Treasury, I
14 believe, in re Smitty's Truck Stop, 210 B.R. 844,
15 848 (10th Circuit B.A.P. 1997). Quoting Neben &
16 Starrett v. Chartwell Financial Corporation in re
17 Park-Helena -- H-E -- or Helena -- H-E-L-E-N-A --
18 Corp. 6 -- 63 F.3d 877 and 881 (9th Circuit
19 1995).

20 See also in re Frye -- F-R-Y-E -- 570
21 B.R. 21, 27-28 (Bankruptcy District of Vermont
22 2017) stating that an inadvertent failure to
23 disclose -- failure to disclose is grounds for
24 disgorgement.

25 In re Gorski, 519 B.R. 67, 73

1 (Bankruptcy Southern District of New York 2014,
2 "anything less than full disclosure leaves
3 counsel exposed to the possibility entire fee may
4 be denied."

5 On the other hand, Courts have
6 discretion to determine whether inaccuracies in
7 the statement of compensation wherein --
8 inadvertent drafting errors that necessitate no
9 sanctions.

10 See in re Bulen -- B-U-L-E-N -- 375
11 B.R. 858 and 862 to 63 (Bankruptcy District of
12 Minnesota 2007). Foregoing sanctions where the
13 attorney made inadvertent drafting errors and
14 cooperated in response to inquiries.

15 See also in re Parklex Associates Inc.
16 435 B.R. 195 and 207 (Bankruptcy Southern
17 District of New York 2010).

18 Quoting Vergos v Mendes and Gonzales
19 PLLC. That's in re McCrary -- M-C-C-R-A-R-Y --
20 and Dunlap Construction Company LLC 79 Federal
21 Appendix 77 -- 770 at 779 (6th Circuit 2003)
22 recognizing that non-compliance with the
23 disclosure requirements can be "inadvertent
24 technical violations which may cause for the
25 imposition of no sanction whatsoever."

1 In re Gage, 394 B.R. 184 at 191
2 (Bankruptcy Northern District of Illinois 2008).
3 "The determination whether the inaccuracies in
4 the 20 -- Rule 2016 statement are purposeful
5 failure to disclose or merely amount to
6 scrivener's error is clearly within the purview
7 of the Court."

8 Here the U.S. Trustee cites Milner to
9 support his argument that the Court should cancel
10 Mr. Russell's agreements with Ms. Ryan because
11 his Rule 2016(b) disclosures were not accurate.
12 Docket number 30 at 104.

13 In Milner, the Court took issue with
14 the initial disclosure filled by the attorney for
15 the debtor that stated he "agreed to accept \$3035
16 while the amended disclosure stated the debtor
17 has agreed to pay \$3035".

18 Milner, 612 B.R. at 435. The Milner
19 Court found that the disclosure to be misleading
20 because the debtor's attorney was not receiving
21 \$3035, instead he was receiving \$2435 and Fresh
22 Start Funding was receiving \$600.

23 Here, Mr. Russell's disclosure states
24 "for legal service, debtor has agreed to pay
25 \$2000." Russell deposition Exhibit 2 at Part 49,

1 Docket number 16 at 1.

2 Based on these facts, the U.S. Trustee
3 knows that Mr. Russell was not in fact receiving
4 the full amount of the fee. Docket number 30 at
5 105.

6 However, the Trustee recognizes that
7 Mr. Russell did not make the similar disclosure
8 error, as in Milner, regarding how much Mr.
9 Russell would accept for the representation
10 assuming that's relevant. Docket number 30 at
11 105.

12 But Mr. Russell did disclose that a
13 lender would take Ms. Ryan's obligation as
14 collateral and the lender would manage Mr.
15 Russell's receivable, which give -- clearly gives
16 notice that the lender would be paid by Ms. Ryan.

17 And in fact when I said she's been
18 paying Fresh Start Funding, that's just a fact.
19 She's paying them as -- at least as the manager
20 of Mr. Russell's receivable.

21 The U.S. Trustee next argues that Mr.
22 Russell inaccurately disclosed the source of
23 compensation as Ms. Ryan. Docket number 30 at
24 105. Docket number 55 at 25 to 26.

25 The U.S. Trustee contends that Fresh

1 Start Funding's line of credit is the source of
2 compensation. And according to the U.S. Trustee,
3 Mr. Russell's disclosures fail to make clear that
4 Mr. Russell received his compensation by
5 borrowing money from Fresh Start Funding. Docket
6 number 30 at 105. Docket number 53 at 25 to 26.

7 The U.S. Trustee further maintains that
8 Ms. Ryan has not paid Mr. Russell in connection
9 with his representation in the case, but she pays
10 Fresh Start Funding and Fresh Start Funding has
11 paid Mr. Russell. Docket number 53 at 25.

12 Nevertheless, the U.S. Trustee also
13 recognizes that Fresh Start Funding's approach
14 involves the extension of a line of credit to Mr.
15 Russell. Docket number 30 at 101.

16 Further, I note that Ms. Ryan's
17 payments were only pledged for security for the
18 debt of Mr. Russell. Fresh Start Funding's fee
19 for the financing, payment management services,
20 credit reporting, et cetera, is calculated as a
21 percentage of the value of the assets securing
22 the line of credit. The amount of the total
23 post-petition fee receivable in each Chapter 7
24 case, which counsel pledges to Fresh Start
25 Funding to be able to make draws against the line

1 of credit.

2 Ms. Ryan is the source of the payment.
3 If Ms. Ryan did not pay, Mr. Russell was liable
4 with Fresh Start Funding for any unpaid amounts.
5 Therefore, I found the disclosures accurate
6 enough because Mr. Russell did disclose the line
7 of credit and the management of the receivable
8 allowing proper inquiry into the complex
9 arrangement.

10 U.S. Trustee also points to Mr.
11 Russell's inaccurate disclosure that he agreed to
12 represent Ms. Ryan in contested matters. Docket
13 number 30 at 105. Docket number 53 at 26.

14 U.S. Trustee notes that the disclosure
15 directly conflicts with the fee agreements and
16 notice of responsibilities. Docket number 53 at
17 26.

18 Nevertheless, there is nothing to show
19 anything more than a mistake rather than an
20 intentional deception. It appears that Mr.
21 Russell understood he would have to represent Ms.
22 Ryan in contested matters as required in the --
23 in this disclosure.

24 And, in fact, Mr. Russell did so in Ms.
25 Ryan's previous case, and other client's cases.

1 And she knew he represented her in that motion to
2 dismiss -- contested motion to dismiss in
3 previous case without charging extra.

4 Further, I certainly would have
5 required Mr. Russell to represent Ms. Ryan in all
6 contested matters. See Local Rule 1007-3-1,
7 9010-3(g), Local Form 1007-3-1(7).

8 The U.S. Trustee argues that like
9 Milner, Mr. Russell represented in his
10 disclosures that he did not agree to share his
11 compensation with any other person other than
12 members or associates of his firm. Docket number
13 30 at 106.

14 The U.S. Trustee contends that the
15 disclosure failed to acknowledge that Ms. Ryan
16 pays fees to Fresh Start Funding which then
17 shares the fees with Mr. Russell. Docket number
18 53 at 27.

19 Thus, the U.S. Trustee maintains that
20 Mr. Russell is sharing compensation with Fresh
21 Start Funding and is questionable at best that
22 Ms. Ryan was aware that Fresh Start Funding was
23 retaining 25 percent of her total payment
24 payments under a fee arrangement. Docket number
25 30 at 106.

1 Nevertheless, as previously discussed,
2 Fresh Start Funding provides a recourse line of
3 credit, the repayment of which is secured by
4 collateral assignment of counsel's fee
5 receivables. And the repayment of that debt is
6 due from Russell. Whether his clients pay or
7 not, Mr. Russell received a loan by -- from Fresh
8 Start Funding.

9 Mr. Russell must repay the line of
10 credit regardless of what he eventually receives
11 in fees from Ms. Ryan. And the amounts paid to
12 Fresh Start Funding are not contingent on Mr.
13 Russell's recovery from Ms. Ryan.

14 Mr. Russell disclosed the financing
15 arrangement, disclosed the line of credit with a
16 letter -- lender. There is no evidence of an
17 intent to deceive by Mr. Russell in this
18 statement as it disclosed the lender line of
19 credit and receivable management.

20 And Mr. Russell still maintains he is
21 not sharing compensation. Russell deposition
22 transcript page 69, lines 2 through 14. 170,
23 line 10 through 171, line 6.

24 Even though the agreement could be
25 recharacterized as an assignment of the

1 receivable, under the agreement as written, the
2 receivable is not assigned. Mr. Russell is not
3 required to recharacterize the agreements as an
4 assignment. The important thing is to disclose
5 the arrangements, which he did.

6 U.S. Trustee next points to the
7 inaccurate disclosure that Ms. Ryan will only
8 make 12 monthly payments rather than the actual
9 number of payments which is roughly 23 payments
10 of \$100, and a single payment of \$35. Docket
11 number 30 at 106. Docket number 53 at 28.

12 This is clearly a mistake and was not
13 an intentional deception. There was no evidence
14 to the contrary. Ms. Ryan clearly understood she
15 had to make 24 payments; thus the mistake does
16 not rise to a level necessitating disgorgement.

17 The U.S. Trustee argues that Mr.
18 Russell's agreements with Ms. Ryan repeat the
19 same practice that drew the Milner court's ire.
20 That being a failure to disclose the claim in the
21 agreements that the bifurcated agreement causes
22 Mr. Russell to charge an additional \$500. Docket
23 number 30 at 106.

24 Even such a disclosure is required, I
25 find that Mr. Russell did not engage in

1 intentional deception that necessitates
2 disgorgement in this case.

3 Further, Ms. Ryan clearly understood
4 she was obligated to pay an extra \$500 by
5 choosing to have her legal services for the case
6 split into two contracts. Ryan deposition
7 transcript 28, lines 9 through 13.

8 The U.S. Trustee next takes issue with
9 Mr. Russell's initial disclosure that simply left
10 amounts blank. Docket number 30 at 106.

11 This error was corrected and was
12 clearly a mistake by Mr. Russell. Not
13 intentional deception.

14 The U.S. Trustee also contends that,
15 like Milner, Mr. Russell's disclosures are
16 confusing and less than complete. Docket number
17 30 at 107. See Milner, 612 B.R. 436.

18 Further, the U.S. Trustee argues that
19 there are gaps in the disclosure that would
20 likely lead to the same result if analyzed under
21 the rubric discussed in Hazlett 2019 Westlaw
22 1567751 at page 10 including that, "all fee
23 arrangements must be fully disclosed in the form
24 B 2030, disclosure of compensation, which must be
25 filed within 14 days of the petition." That's

1 Docket number 30 at 107.

2 Here, Mr. Russell's disclosures
3 sufficiently revealed a fee arrangement.
4 Further, Local Rule Local Form 1007-1(a) states,
5 "statement of compensation shall conform
6 substantially to Local Form 1007-1."

7 In this case, Mr. Russell's fee
8 disclosure substantially conform to the Local
9 Form. See Russell deposition Exhibit 2 at pages
10 49 through 50. Docket number 16, Local Form
11 1007-1.

12 His disclosures also added paragraphs
13 beyond the Local Form, and the added paragraph
14 describe the fee arrangements or highlighted the
15 contained amounts that were not filled out. See
16 Russell deposition Exhibit 2 at 49 through 50.
17 Docket number 16, Local Form 1007-1.

18 In review of the disclosures, the
19 arrangement caught the Court's attention to
20 further examine the fee arrangement. See Federal
21 Rule of Bankruptcy Procedure 20 -- 2017(b)

22 Further, Mr. Russell complied with
23 inquiries to supplement the record for me to
24 determine reasonable compensation under Section
25 329(b).

1 The U.S. Trustee's last argument is Mr.
2 Russell's disclosure failed to provide an
3 accurate and reasonably complete account of his
4 arrangement with Fresh Start Funding. Docket
5 number 53 at 28 to 29.

6 Further, the U.S. Trustee contends that
7 errors in the initial disclosure suggest that Mr.
8 Russell may not even have reviewed the original
9 disclosure. Docket number 53, 29.

10 But as previously discussed, while the
11 disclosures should have been better, Mr.
12 Russell's disclosures contain sufficient
13 information as errors were correctable mistakes,
14 not intentional deception.

15 In Milner, the Court voided the
16 retainer agreements, but nevertheless, allowed
17 attorney's fees in what I assume to be to be the
18 amount of \$1900. See 16 -- see 612 423 to 24,
19 26, 443 to 44. Ordering one final payment of
20 \$200 in December for payments that started in May
21 and included \$300 in fees that were paid pre-
22 petition.

23 The Milner Court allowed those fees
24 giving the debtor "had a satisfactory income" --
25 excuse me -- "outcome in her bankruptcy case."

1 Page 443 -- 4-4-3.

2 In its reasoning for the order, the
3 Court stated that its "sole concern is the
4 mechanism counsel selected for payments of his
5 attorney's fees. Such mechanism with
6 insufficient disclosures and confusing contracts
7 resulted in a significant upcharge in the form of
8 post-petition debt being incurred by a
9 financially challenged, distress and unfit --
10 unsophisticated debtor." That's page 443, note -
11 - footnote 32.

12 Here I find the disclosures in this
13 case are distinguishable from Milner. In this
14 case, Ms. Ryan testified she understood the fee
15 arrangement. Further, there's no evidence before
16 me that she's an unsophisticated debtor who was
17 confused by the retainer agreements or
18 disclosures. To the contrary, she appears to
19 have a good understanding of the agreements and
20 is quite intelligent.

21 But even if I voided the agreements, I
22 would still allow \$1285.50 in fees -- to be
23 discussed in a minute here -- since there was a
24 satisfactory result for the work performed, just
25 as in Milner.

1 Therefore, Mr. Russell's taking the
2 compensation meets the requirement under Code and
3 Rules and does not warrant disgorgement.

4 C. The amount of Mr. Russell's fees is
5 unreasonable. Section 329 of the Bankruptcy Code
6 governs the fee arrangements when the debtor and
7 the attorney representing the debtor -- that's
8 Schroeder v. Rouse in re Redding, 247 B.R. 474
9 and 478, (8th Circuit B.A.P. 2000).

10 See also Fiegen -- F-I-E-G-E-N -- Law
11 Firm v. Fokkena -- F-O-K-K-E-N-A -- in re On-Line
12 Servs. Ltd., 324 B.R. 342 at pages 347-49 (8th
13 Circuit B.A.P. 2005).

14 Applying Lamie v. United States, 540
15 unit -- U.S. 526 (2004).

16 Section 329(b) provides "if such
17 compensation exceeds the reasonable value of any
18 such services, the Court may cancel any such
19 agreement or order the return of any such payment
20 to the extent excessive."

21 "Section 329 requires the attorney to
22 show the agreed upon compensation for legal
23 services is reasonable.

24 Zepecki -- Z-E-P-E-C-K-I -- v. Luker in
25 re Zepecki, 277 F.3d 1041 at 1046 (8th Circuit

1 2002). Citing Snyder v. Dewoskin -- D-E-W-O-S-K-
2 I-N -- in re Mahendra -- M-A-H-E-N-D-R-A, 131
3 F.3d 750 at 757 (8th Circuit 1997).

4 See Clark, 223 F.3d at 863. "A
5 disgorgement is only allowed to the extent that
6 the fees are excessive."

7 Brown v. Luker in re Zepecki, 258 B.R.
8 719 at 725 (8th Circuit B.A.P. 2001).

9 Citing Redding 247 B.R. at 478-79.

10 Here, as previously discussed, the U.S.
11 Trustee's best interest analysis fails to
12 demonstrate under 329(b) that Mr. Russell should
13 be required to refund the entire fee to Ms. Ryan.

14 Both parties have decided the lodestar
15 method as a standard to apply to a determination
16 of reasonable compensation of a debtor's
17 attorney. Docket number 30 at 108 and Docket
18 number 55 at 14.

19 "Section 330 governs the allowance of
20 attorney's fees and permits the Court on its own
21 motion or on the motion of a Trustee or other
22 party in interest to award compensation that is
23 less the amount requested."

24 Bachman v. Pelofsky in re Peterson --
25 Pelofsky is P-E-L-O-F-S-K-Y -- , 251 B.R. 359 at

1 363 (8th Circuit B.A.P. 2000), aff'd, 13 F.

2 Appendix -- A-P-P-'-X -- 491 (8th Circuit 2001).

3 See also American Law Ctr. v. Stanley
4 in re Jastrem -- J-A-S-T-R-E-M --253 F.3d 438 at
5 443 (9th Circuit 2001). "Section 330 sets out
6 the standard by which courts should determine the
7 reasonableness of fees under Section 329."

8 Under 11 U.S.C. Section 330(a)(3),
9 "Court shall consider the nature, the extent, and
10 the value of such services, taking into account
11 all relevant factors."

12 In determining the reasonableness of
13 fees under 330, the 8th Circuit applies the
14 lodestar method.

15 Chamberlain v. Kula in re Kula -- K-U-
16 L-A --, 213 B.R. 729 at 736 (8th Circuit B.A.P.
17 1997).

18 Citing P.A. Novelly -- N-O-V-E-L-L-Y --
19 v. Palans -- P-A-L-A-N-S -- in re Apex Oil.
20 That's 960 F.2d 728 at 731 (8th Circuit 1992).

21 Under the lodestar method, a Court
22 multiplies the hours expended by the attorney and
23 the action by a reasonable hourly rate of
24 compensation and makes any necessary adjustment
25 to that figure. Johnston v. Comerica Mortgage

1 Corporation, 83 F.3d 241 at 244 (8th Circuit
2 1996)).

3 See also Peterson, 251 B.R. 363 to 364.
4 "We have consistently held that the lodestar
5 method calculated by multiplying the reasonable
6 hourly rate by the reasonable number of hours
7 required to represent the debtor in the case is
8 the appropriate approach for determining
9 reasonable compensation under section 30."

10 I note that the 8th Circuit Bankruptcy
11 Appellate Panel has recognized there are
12 circumstances where the lodestar method is
13 inappropriate for calculating reasonable fees
14 such as the flat fee -- such as in flat fee
15 arrangements.

16 In re Kula, 213 B.R. 737 footnote 5,
17 describing various flat fee arrangements that
18 have been permitted without application of
19 lodestar, including a "normal and customary debt-
20 based formula."

21 Mr. Russell usually charges a flat fee.
22 A \$1500 to \$1700 for his services, which
23 according to precedent would not necessarily
24 require him an analysis utilizing the lodestar
25 method.

1 However, since both Courts have
2 referenced the lodestar method in their arguments
3 regarding Mr. Russell's fees, I will apply the
4 lodestar method.

5 I will not allow Mr. Russell a fee of
6 \$2000. A fee of \$2000 is \$300 to \$500 more than
7 Mr. Russell generally charges for his
8 representations in bankruptcy cases.

9 It is clear that the additional amount
10 charged by Mr. Russell as a result of his funding
11 agreement with Fresh Start Funding which was
12 entitled 25% of the \$2000 and leaving Mr. Russell
13 with approximately his normal flat fee.

14 The additional labor required by Mr.
15 Russell in this case related to the paperwork for
16 financing with Fresh Start Funding, his lender,
17 Ms. Ryan should not be required to pay for the
18 financing arrangements of Mr. Russell with Fresh
19 Start Funding.

20 See Milner 612 B.R. at 440. Finding
21 the upcharge for the fee arrangement behind the
22 attorney's customary rate as excessive
23 compensation.

24 See also Hazlett, 2019 Westlaw at 12,
25 recognizing the concern with a client who pays an

1 upcharge for a bifurcated fee arrangement.

2 In fact, his -- Ms. Ryan's case is
3 clearly a relatively simple case with fee assets
4 or debts and no potential contested matters as
5 occurred in her 2009 case where he charged
6 approximately \$1400.

7 But it makes no sense to charge more
8 for this simple case than her more complex case
9 solely because the attorney's financing
10 arrangements.

11 To the extent Mr. Russell can charge
12 \$500 more for this case because of the risk of
13 Ms. Ryan's failure to pay, he concedes her
14 payment is not particularly risky. The money is
15 deducted from the bank automatically and she
16 receives Social Security.

17 Further, she paid \$1000 post-petition
18 in her 2000 case, even though she knew she was
19 not required to do so.

20 In any event, Mr. Russell did not
21 calculate or produce evidence of an appropriate
22 interest rate. In fact, Mr. Russell was willing
23 to take this case if Ms. Ryan would pay only the
24 filing fee pre-petition and then, he would rely
25 on her moral obligation to pay the rest of the

1 fee post-petition.

2 In this case, Mr. Russell estimated he
3 performed approximately \$1965.50 in services in
4 Ms. Ryan's case. But that amount included Mr.
5 Russell's pre-petition services which he has
6 waived in this case. Without the fees associated
7 with his pre-petition work, which he waived, it
8 is estimated that Mr. Russell's -- Mr. Russell
9 performed approximately \$1285.50 worth of
10 services in Ms. Ryan's case.

11 Mr. Russell's uses of a flat fee rate
12 in this case makes a typical lodestar
13 multiplication analysis difficult. On the basis
14 of his estimation of work performed and time
15 expended in belief that \$250 would be a
16 reasonable rate for an attorney with his
17 experience, I find that \$1285.50 is the
18 reasonable fee amount to be charged in this case.

19 Just to be clear, that amount is a --
20 Mr. Russell, on an exhibit to his deposition, it
21 list what he would -- the tasks that he normally
22 performs in a Chapter 7 case, pre- and post-
23 petition. We deduct out the pre-petition which
24 make -- which is being waved and deduct out
25 services he never had to perform. And that's how

1 we get down to the \$1965, and then take out the
2 pre-petition amount which, I believe, was \$680.
3 And that's where we get the \$1285.50.

4 Counsel for Mr. Russell concedes this
5 Court has discretion in determining reasonable
6 fees under Section 329. And I can take into
7 account what's a normal fee based on my own
8 experience.

9 See *Childress v. Fox Associates LLC*,
10 932 F.3d 1165 at 1172 (8th Circuit 2019). "A
11 Court has great latitude to determine a
12 reasonably hour -- a reasonable hourly rate
13 because it is intimately familiar with its local
14 bar."

15 Quoting *Michael J Banks v. Slay*, 875
16 F.3d 876 at 882 (8th Circuit 2017). *Bryant v.*
17 *Jeffrey Sand Company*, 919 F.3d 520 at 529 (8th
18 Cir. 2019). "When determining reasonable hourly
19 rates, the court may rely on their own experience
20 and knowledge of prevailing markets."

21 Quoting *Hanig v. Lee -- H-A-N-I-G -- v.*
22 *Lee*, 415 F.3d 822 at 825 (8th Cir. 2005).
23 Although I -- reluctant to take my own experience
24 to account, and don't base the decision on my own
25 experience, I do know that \$2000 is excessive in

1 this district for a simple case such as this one.

2 Therefore, any amount paid in excess of
3 \$1285.50 by Ms. Ryan for services rendered by Mr.
4 Russell must be disgorged and not collected.

5 II. The U.S. Trustee fails to
6 demonstrate that Mr. Russell's agreements with
7 Ms. Ryan violate Sections 526 and 528 of the
8 Bankruptcy Code.

9 Mr. Russell meets the statutory
10 definition of Bankruptcy Code of a "debt relief
11 bankruptcy." See 11 USC Section 101(12)(a).

12 As such, he's subject to Sections 526
13 to 28 of the Bankruptcy Code. Section 526(c)(1)
14 provides "any contract for bankruptcy assistance
15 in a debt relief agency and an assisted person
16 that does not comply with the material
17 requirements of this section, section 527, or
18 section 528 shall be void and may not be enforced
19 by any Federal or State court or by any other
20 person, other than such assisted person."

21 11 USC Section 526(c)(1). Here the
22 U.S. Trustee does not cite material requirements
23 from Section 526 or 527. Rather, the U.S.
24 Trustee specifically cites Section 528(a)(1),
25 Docket number 30 at 109, Docket number 53 at 34

1 through 36.

2 Section 528(a)(1) states "a debt relief
3 agency shall --

4 (1) not later than five days after the
5 first date on which such agency provides any
6 bankruptcy assistance services to an assisted
7 person, but prior to such assisted person's
8 petition under this title being filed, execute a
9 written contract with such assisted person that
10 explains clearly and conspicuously --

11 (A) the services such agency will
12 provide to such assisted person; and

13 (B) the fees or charges for such
14 services, and the terms of payment. 11 USC
15 Section 528(a)(1).

16 The U.S. Trustee again argues what
17 Milner has instructed. Docket number 30 at 109.

18 In Milner, the Court noted the length
19 and density of the pre-petition and post-petition
20 agreements and criticized the extensive use of
21 legalese in both documents. Milner, 442 to 443.

22 For example, the Milner court found
23 that "confusing legalese included an express
24 disclaimer of any legal representation with
25 respect to the pre-petition contract or the post-

1 petition contract combined with a recommendation
2 that debtor seek independent legal counsel to
3 review the contracts." At page 443.

4 Here, the U.S. Trustee argues that Mr.
5 Russell's agreements with Ms. Ryan suffer from
6 most of the same defects. Docket number 30 at
7 109.

8 Further, the U.S. Trustee contends that
9 it appears that Fresh Start Funding has increased
10 the lengthy -- has increased the length and
11 complexity of the agreements that it provides the
12 bankruptcy attorney. Docket number 30 at 109.

13 Therefore, the U.S. Trustee argues that
14 the evidence shows that Mr. Russell's agreement
15 did not explain clearly and conspicuously the
16 scope of services. Docket number 53 at 34.

17 U.S. Trustee also argues that Mr.
18 Russell has not read and did not understand the
19 language regarding potential conflicts. Docket
20 number 53 and 35.

21 For example, Mr. Russell acknowledge
22 the language in the agreements he had purported
23 to exclude purported contested matters from the
24 scope of representation and was incorrect.
25 That's Russell deposition transcript 138, line 25

1 through 140, line 5.

2 U.S. Trustee next argues that Mr.
3 Russell admitted to the notion of a separate
4 attorney reviewing the reasonableness of the
5 terms in the engagement or of Ms. Ryan obtaining
6 new counsel post-petition was largely illusory.
7 Docket number 53 at 35.

8 Further, the U.S. Trustee contends that
9 Ms. Ryan did not understand that Mr. Russell
10 would have to keep representing her and her
11 bankruptcy case even if she declined to hire him
12 for post-petition services. Docket number 53 at
13 35.

14 The U.S. Trustee also points to Ms.
15 Ryan's admission that Ms. Ryan did not see either
16 of the retainer agreements prior to the day that
17 Mr. Russell filed her petition. Docket number 53
18 at 35.

19 And Ms. Ryan did not see the post-
20 petition agreement until after the filing of the
21 petition, and apparently, and no more than at
22 most nine minutes to review it.

23 U.S. Trustee contends that's it is
24 unlikely that anyone, including a seasoned
25 bankruptcy attorney, could read through the post-

1 petition agreement in that amount of time and
2 emerge with a meaningful understanding of all the
3 terms contained in the agreement. Docket number
4 30 at 109 and 110.

5 The U.S. Trustee states there's no
6 reason to believe that Ms. Ryan understood it
7 either. Docket number 30 at 110.

8 The U.S. Trustee again relies on Milner
9 and argues that to compound the complexity of the
10 post-petition agreement, both agreements included
11 provisions that required the debtor to
12 acknowledge that she understood about the various
13 potential conflicts of interest and the right to
14 independent counsel and choose to waive that
15 right in any potential conflicts. Docket number
16 30 at 110.

17 The U.S. Trustee also argues that the
18 agreements do not adequately convey the impact of
19 Fresh Start Funding's involvement in the case.
20 Docket number 30 at 110.

21 In other words, the U.S. Trustee
22 maintains that neither agreement communicates
23 that Fresh Start Funding will retain 25 percent
24 of the fees paid by Ms. Ryan. Docket number 30
25 at 110.

1 And the U.S. Trustee argues that
2 passage in the agreement is a material
3 requirement of Section 528(a)(1).

4 A. Mr. Russell's engagement agreement
5 meets 528's requirements in this case. Here, Mr.
6 Russell's fee -- pre-petition agreement explains
7 "payments and filing actions" in paragraph one
8 which also disclosed the higher fee if the client
9 chooses not to prepay for the entire engagement.
10 Russell deposition Exhibit 5 at 72.

11 Paragraph 2 identifies all the services
12 that Mr. Russell will provide pre-petition if the
13 client choose to split the engagement in order to
14 make post-petition installment payments of the
15 attorney's fees. Russell deposition Exhibit 5 at
16 72.

17 It further explains in paragraph 4 the
18 options that Ms. Ryan will have to complete the
19 case and enumerates exactly what services will be
20 provided post-petition if the debtor signs a
21 separate post-petition agreement. Russell
22 deposition Exhibit 5 at 72 to 73.

23 This list of services is reiterated in
24 the post-petition agreement in paragraph 1. See
25 Russell deposition Exhibit 6 at 79.

1 As to payment terms, the pre-petition
2 agreement explains the maximum payment term and
3 different options for payment frequency in
4 paragraph 4(a). Russell deposition Exhibit 5 at
5 73.

6 Paragraph one of the post-petition
7 agreement parallels this exact disclosure.
8 Russell deposition Exhibit 6 at 79.

9 In this case, Ms. Ryan's testimony
10 makes it clear she understood the fundament --
11 these fundamental attributes of her engagement of
12 Mr. Russell. Most importantly, the U.S. Trustee
13 provided no evidence that Ms. Ryan found it
14 complex and confusing or was more complex than a
15 lease, car loan or student load. Documents that
16 she clearly agreed to in the past and actually
17 testified she understood the arrangement.

18 Of course, this only applies to Ms.
19 Ryan. It's possible, with appropriate evidence,
20 I would hold that the agreements violate these
21 provisions in other cases.

22 Therefore, I find that while the
23 agreements between Mr. Russell and Ms. Ryan are
24 lengthy and detailed, the agreements are clear
25 and conspicuous in their explanation of the exact

1 services that will be provided and the
2 alternatives that Ms. Ryan was presented for a
3 pre-paid and bifurcated engagement and the terms
4 of payment.

5 Further, Mr. Russell explained the
6 terms of the engagement to Ms. Ryan, including
7 her options to either prepay the attorney fee or
8 to pay a higher fee in installments after her
9 case was filed. And the explanation spanned
10 almost two weeks -- three in person meetings and
11 several hours before the case was filed.

12 Therefore, the retainer agreements meet
13 the narrow statutory requirements in Section 528
14 in this case.

15 I note that the Milner case, upon which
16 the U.S. Trustee predicates nearly the entirety
17 of its arguments is distinguishable from this
18 case in at least one way.

19 In Milner, the debtor was not available
20 to testify, leaving the court having to look at
21 that issue in a virtual vacuum. That's Milner at
22 433, note 17.

23 Here, in contrast, I need not rely on
24 the documents or speculate about what the debtor
25 might or might not have understood. Ms. Ryan has

1 removed all doubt about whether she gave informed
2 consent to the bifurcation of her agreement, and
3 to the higher fee to pay Mr. Russell over time.

4 However, the agreement might in fact be
5 too confusing or complex for other debtors in
6 other cases. Again, this decision only applies
7 to this case.

8 Further, as to the broader issue of
9 informed consent, consumers like Ms. Ryan are
10 legally expected to understand and make binding
11 choices about a host of life issues where the
12 operative documents were -- are at, at least, in
13 many instances, much more complicated than
14 Russell's engagement agreement.

15 Consider for example the disclosures
16 Congress mandated debtors receive and then
17 paralegally presume to understand for 11 USC
18 Section 342(b) Bankruptcy Form 2010.

19 Ms. Ryan assumably has signed complex
20 student loan lease and car loan documents and in
21 the past, she had a mortgage in her 2009 case.

22 Those disclosures are easily as
23 complicated -- or those agreements rather -- are
24 as easily as complicated or more so than the
25 engagement agreement here.

1 And again, that's not evidence in this
2 case. That's just stating what might be an
3 assumption.

4 And while it is certainly true that Mr.
5 Russell's documents also must satisfy the
6 requirements of Section 528, those requirements
7 are actually narrow and simple, and there could
8 be no reasonable argument that Mr. Russell's
9 engagement failed to satisfy Section 528 mandate
10 in this case.

11 U.S. Trustee next argues the retainer
12 agreements are difficult to understand when run
13 in conjunction with a notice of responsibility in
14 Mr. Russell's 2016 disclosures. Docket number 30
15 at 110.

16 In support of the argument, the U.S.
17 Trustee points to Mr. Russell's rule 2016(b)
18 disclosures that conflict with the retainer
19 agreements in the question of how many payments
20 Ms. Ryan's required to make, and by implication,
21 the amount of the payments. Docket number 30 at
22 110.

23 Further, the U.S. Trustee contends the
24 retainer agreements also appear to conflict with
25 the representations about the scope of services

1 in the notice of responsibilities and in the 2016
2 disclosures. Docket number 30 at 110.

3 The U.S. Trustee indicates that the
4 scope of Mr. Russell's services and the payment
5 schedule for Ms. Ryan also represents material
6 requirements of 528(a)(1). Docket number 30 at
7 110.

8 However, the idea that Ms. Ryan would
9 be confused by counsels B -- 20-- 30 disclosure
10 is not supported by any evidence. That
11 disclosure is made to the court, not to the
12 client. Ms. Ryan already entered into her
13 engagement before Mr. Russell even filed his
14 first, and later amended, disclosure with the
15 court.

16 Further, the minor inconsistencies with
17 the notice of rights and responsibilities are not
18 material and should be corrected in future
19 arrangements.

20 Thus, if there's any confusion about
21 the scope of services, the whole point of the
22 notice of rights and responsibilities is to make
23 sure that it represented -- better understands
24 what to expect from counsel.

25 Therefore, they -- the U.S. Trustee

1 fails to show that the retainer agreements are
2 void under Section 526(c)(1), at least that's --
3 as in this case.

4 So, the end result here is that Mr.
5 Russell's fees are reduced to \$1285.50.
6 assumably -- I don't know this but -- assumably
7 at \$100 a month, Ms. Ryan has not paid that. We
8 have to add in the \$335 filing fee. And so, we
9 get a total of \$1620.50. \$1620.50. Assuming
10 that's not already been paid. That is the total
11 amount that Mr. Russell is allowed to receive.

12 And Ms. Ryan is not required to pay
13 anything more than that. She is not required to
14 do so.

15 And again, some of the issues -- the
16 Trustee rates also might go to the enforceability
17 of the agreement, but that's not before me.

18 For example, was it really a pre-
19 petition agreement? Did she really decide and
20 did the parties really decide that this was how
21 they were going to go prior to the bankruptcy?
22 And, therefore, an argument that it's -- that
23 this has been discharged. That the -- I also
24 note that even if I had ruled and voided the
25 agreements and found they violated Section 526

1 and 528, for example, I still would have followed
2 the Milner decision and allowed fees which would
3 have been the exact same amount to \$1285.50 based
4 on the evidence that I had. Just as the Milner
5 court allowed a larger amount in that case
6 because of the positive result in the case which
7 also occurred here.

8 I also not again that although it's
9 true a number of -- a large number of her debts
10 are not discharged -- or could be at some point
11 if she brought a lawsuit on the student loans --
12 but in any event, could be if -- depending on how
13 that kind of case go. Whether she could prove
14 it's an undue hardship, et cetera.

15 Nonetheless, that the \$2200 plus in
16 fees have been discharged. Her stress has been
17 relieved. And that \$1285.50 is a reasonable fee
18 to pay for that result. Plus the \$335 in filing
19 fee. I also note -- we discussed that the
20 Trustee argued that she could have filed for a
21 fee waiver. She could have but if she had the
22 ability to pay \$100 a month post-petition, I
23 can't say how I'd rule on something like that.
24 But one of the things that Congress has us look
25 at is can they pay it in installments. Even if

1 they're below the 150 percent of the poverty
2 level.

3 And so, even if she's below that
4 amount, the second inquiry, of course, can she
5 pay in installment? And the evidence I have here
6 is, based on her deposition, is that yes, she
7 could.

8 So, in any event, that's the decision .
9 I want to again emphasize, and you may be
10 wondering why didn't I put all this in writing
11 since I was clearly reading it? Why not file it
12 in that way, you know, and the principal reason
13 is because I don't want this decision to be
14 floating around as some kind of pronouncement on
15 other cases. This is very unique to the -- this
16 particular case.

17 A decision could be quite different in
18 another case. It's also important that the
19 parties did not bring a number of issues agreed.
20 The number of issues were not before me. And
21 although I'm not amused about various thing
22 during oral argument, I agree with the parties.
23 Those issues ultimately -- I'm convinced by those
24 arguments of counsel. Those things are just
25 simply not before me.

1 And -- including the -- whether or not
2 this type of arrangement is not, per se, not
3 allowed. I'm not deciding that that today. The
4 U.S. Trustee did not argue it. That's not to say
5 how I decide that one way or the other. But it's
6 just not before me. I have all the facts in this
7 case, and the facts in this case point to
8 \$1285.50 being allowed as a fee. And that Ms.
9 Ryan is not required to pay any more than that
10 amount.

11 I will issue a very brief order with a
12 summary of what I said today. Hopefully, in a
13 manner that a layman can understand so that Ms.
14 Ryan can read that and understand what I did not
15 decide today as well so she understands what's
16 happened here.

17 And I will require that Mr. Russell get
18 a copy of that to Ms. Ryan as well.

19 So, again, it's very important that
20 counsel understand what I'm not deciding here
21 today and that these -- if they were hoping for -
22 - if either one of them or both were hoping for
23 some broad pronouncements, almost to the
24 legislative nature, it's just not happening.
25 Those issues were not before me. The facts of

1 this case are fairly unique. And a result could
2 be quite different. I'd also note that some of
3 the things the U.S. Trustee has complained of in
4 the disclosures are -- can easily be met even if
5 I'd agree in this case that they were sufficient,
6 in future cases, many of the things that the U.S.
7 Trustee has complained of could be easily met and
8 supplemented in disclosures to potentially avoid
9 this type of problem in the future -- or this
10 type of motion in the future.

11 So, that is something to give some
12 thought to. At least in this district.

13 And with that, I've got nothing else.
14 I will put on the record here today -- as I did
15 mention, I will -- again, not a chance to argue
16 with me, but if there's a procedural issue or
17 something along those lines, you certainly can
18 raise it now.

19 Mr. Kreuziger, is there anything you
20 want raise with me before we go off the record?

21 MR. KREUZIGER: No, Your Honor. Thank
22 you.

23 THE COURT: Thank you for your time.

24 Mr. Garrison, anything you want to
25 raise with me before we go off the record?

1 MR. GARRISON: Just to thank you for
2 your attention to detail and your fairness,
3 Judge. It's been a pleasure appearing before you
4 and I appreciate again the privilege of
5 (indiscernible).

6 THE COURT: Well, thank you, sir. And
7 I do want to -- I should have mentioned this. I
8 was very impressed with how the two of you got
9 along in this case and how you both argued this
10 case.

11 I read those deposition transcripts and
12 they were a pleasure to read. The two of you
13 were clearly polite to each other and rarely
14 objected. And if you did object, it was
15 unobtrusive and it was for the record. And I was
16 extremely impressed. I think back to my days in
17 practice and some of the things attorneys did --
18 and I think things have changed since those day,
19 by the way.

20 But putting that aside, the two of you
21 clearly minimized attorney's fees, cooperated,
22 understood you had a difference of opinion, but
23 also understood that you needed to be
24 professional and you were.

25 And I was extremely impressed. And

1 also, I was extremely impressed with your oral
2 arguments. By the way, I -- went off on some
3 tangents there, certainly. This was a new issue
4 for me, and I wanted to explore certain things
5 and certain things that I've now told you today,
6 I don't believe were before me. So, I made you
7 all go up a couple of blind alleys.

8 And I'm sorry I did that, but I wanted
9 to get my arms around this thing. And I, again,
10 appreciate your patience in doing that. The two
11 of you indulged me and did that. And I very much
12 appreciate that. So, I, again, I can't tell you
13 -- reading those deposition transcripts, how
14 happy that made me feel to see that people were -
15 - to see how two attorneys can get along and not
16 play games and let the evidence come out in a way
17 that's appropriate and object when it is
18 appropriate but also not to do so just simply to
19 coach witnesses or to block things.

20 And so, again -- and it's also --
21 again, extremely impressed that you were able to
22 submit those and not have live testimony or semi-
23 live testimony and minimizing Ms. Ryan's time,
24 which is very important. And for that matter,
25 Mr. Russell's time.

1 And so, I -- thanks to your
2 cooperation, I think you minimized some of the
3 pain that might have occurred in this case or did
4 occur in this case.

5 So, again, I thank you both very much.
6 I hope you both remain healthy and safe and have
7 a good remainder of your week.

8 I'll get the orders -- I'll get
9 everything filed today so you'll be seeing those
10 trickling out during the afternoon.

11 Thank you all very much. And again,
12 have a good afternoon.

13 MR. KREUZIGER: Thank you, Judge.

14 MR. GARRISON: Thank you, Your Honor.

15 (Whereupon these proceedings were concluded.)
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I N D E X

RULINGS

Page Line

Fees reduced to \$1285.50 5 21

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde
Veritext Legal Solutions
330 Old Country Road
Suite 300
Mineola, NY 11501

Date: October 15, 2020

[& - 25]

Page 1

&	110 51:4,7,16,20	1700 42:22	2009 21:15 44:5
	51:25 56:15,22	171 33:23	55:21
	57:2,7	18 18:20 19:11	2010 27:17 55:18
& 26:15	112 15:16 20:22	180 19:10	2014 27:1
1	11501 67:12	1805 3:5	2016 13:7 24:10,19
1 9:10 10:15 13:2	1165 46:10	184 28:1	25:13 28:4,11
14:6 15:16 18:22	117 18:21 19:10	19 7:19 14:12,15	56:14,17 57:1
19:10 20:22 29:1	1172 46:10	14:20 15:1,6 20:8	2017 6:23 26:22
47:13,21,24 48:2,4	118 18:22 19:10	19-33190 1:3 4:4	36:21 46:16
48:15 52:3,24	12 11:5 20:8 34:8	1900 37:18	2018 8:22
57:6 58:2	43:24 47:11	191 28:1	2019 8:20,23,24
10 8:24 10:2 33:23	12151 67:7	195 27:16	10:1 35:21 43:24
35:22	1285.50 5:22 38:22	1965 46:1	46:10,18
100 9:5 15:11,15	45:9,17 47:3 59:3	1965.50 45:3	2020 1:16 8:15
15:16 20:3,21	59:17 61:8 66:6	1992 41:20	22:9 67:15
22:6 34:10 58:7	1285.50. 46:3 58:5	1995 26:19	2030 35:24
59:22	13 6:19 35:7 41:1	1996 42:2	207 27:16
1000 44:17	131 40:2	1997 26:15 40:3	21 15:22 16:3 18:4
1006-1 24:25	133 17:1	41:17	18:13 19:2,18,25
1007-1 25:2 36:4,6	134 17:1	2	20:16 26:21 66:6
36:11,17	1340 15:8	2 9:16 10:18 13:6	210 26:14
1007-3-1 32:6,7	138 49:25	18:22 28:25 33:22	213 41:16 42:16
101 11:17,24 30:15	14 9:21 10:11	36:9,16 52:11	216 26:8
47:11	33:22 35:25 40:18	20 15:6,22 17:6,12	22 21:6
102 13:20,24 14:3	140 50:1	17:17 18:3 19:10	22,277 16:9 21:21
14:12,15	1400 44:6	28:4 36:21 57:9	22:10
103 15:21 20:13	147 20:8	20,000 14:22	2200 59:15
104 28:12	148 20:9	200 16:1 37:20	223 26:3 40:4
1041 39:25	15 67:15	2000 5:6 26:4	23 12:6 34:9
1046 39:25	150 60:1	28:25 39:9 41:1	2335 18:2
105 29:5,11,24	1500 42:22	43:6,6,12 44:18	24 15:16 20:22
30:6 31:13	1567751 8:23 10:2	46:25	34:15 37:18
106 32:13,25 34:11	35:22	2001 21:15 25:5	2400 12:17
34:23 35:10	16 29:1 36:10,17	40:8 41:2,5	241 42:1
107 35:17 36:1	37:18	2002 40:1	2435 28:21
108 40:17	16-30360 8:23	2003 27:21	244 42:1
109 47:25 48:17	1620.50. 58:9,9	2004 39:15	247 39:8 40:9
49:7,12 51:4	1679 14:19 15:9	2005 39:13 46:22	25 10:19 16:11
10th 26:15	17 54:22	2007 27:12	18:21 19:11 29:24
11 11:4,11 16:7	170 33:22	2008 28:2	30:6,11 32:23
17:1 41:8 47:11			43:12 49:25 51:23
47:21 48:14 55:17			

[250 - 79]

Page 2

<p>250 45:15 251 40:25 42:3 253 41:4 258 40:7 26 12:9,18 29:24 30:6 31:13,17 37:19 263 25:3,24 26:9 27 32:18 27-28 26:21 277 39:25 28 34:11 35:7 37:5 47:13 29 37:5,9</p>	<p>39:16,21 40:12 41:7 46:6 33 10:3 330 40:19 41:5,8 41:13 67:10 335 12:11 58:8 59:18 34 14:5 47:25 49:16 342 39:12 55:18 347-49 39:12 35 34:10 49:20 50:7,13,18 359 40:25 36 48:1 363 41:1 42:3 364 42:3 375 27:10 394 28:1</p>	<p>443 12:23 13:13 37:19 38:1,10 41:5 48:21 49:3 474 39:8 478 39:9 478-79 40:9 49 28:25 36:10,16 491 41:2</p>	<p>570 26:20 571.922 16:18,21 590 11:5 591 8:21</p>
3		5	6
<p>3 9:19 10:22 13:8 16:11 17:21 41:8 30 1:16 7:17,18 9:5 11:16,23 13:20,23 14:3,12 14:15 15:21 20:7 20:13 28:12 29:4 29:10,23 30:6,15 31:13 32:13,25 34:11,23 35:10,17 36:1 40:17 42:9 47:25 48:17 49:6 49:12 51:4,7,16,20 51:24 56:14,21 57:2,6,9 300 12:10 37:21 43:6 67:11 3035 28:15,17,21 316 1:13 3:12 32 38:11 3200 15:24 324 39:12 328 26:7 329 7:9,12,16,20 21:2 24:9,14,20 25:7 36:25 39:5</p>	4	<p>5 20:5,9 42:16 50:1 52:10,15,22 53:4 66:6 50 13:8 36:10,16 500 20:6 34:22 35:4 43:6 44:12 519 26:25 520 46:17 523 16:7 526 39:15 47:7,12 47:13,21,23 58:2 58:25 527 47:17,23 528 13:12 47:7,18 47:24 48:2,15 52:3 54:13 56:6,9 57:6 59:1 528's 52:5 529 46:17 53 7:19 14:12,15 14:20 15:1,6,22 17:6,12,17 18:3,13 19:1,18,25 21:6 30:6,11 31:13,16 32:18 34:11 37:5 37:9 47:25 49:16 49:20 50:7,12,17 540 39:14 55 29:24 40:18 550.37 16:3 55101 1:14 3:13</p>	<p>6 26:18 33:23 52:25 53:8 600 22:1 28:22 612 8:19 10:3 28:18 35:17 37:18 43:20 613 8:13 63 26:18 27:11 67 26:25 68 8:21 680 46:2 69 33:22 6th 27:21</p>
			7
			<p>7 5:24 18:17 21:19 30:23 32:7 45:22 719 40:8 72 52:10,16,22 725 40:8 728 41:20 729 41:16 73 14:17 20:5 26:25 52:22 53:5 731 41:20 736 41:16 737 42:16 75 11:9 750 40:3 757 40:3 77 27:21 770 27:21 779 27:21 79 27:20 52:25 53:8</p>

[8 - appreciate]

Page 3

8	a	agree 6:4 32:10 60:22 62:5	amended 28:16 57:14
8 16:7 17:1	ability 59:22	agreed 7:25 19:22 24:17,21 25:9	american 41:3
80 13:9 15:8	able 21:23 22:3 30:25 64:21	28:15,17,24 31:11 39:22 53:16 60:19	amount 11:10 25:16 28:5 29:4 30:22 37:18 39:4 40:23 43:9 45:4 45:18,19 46:2 47:2 51:1 56:21 58:11 59:3,5 60:4 61:10
822 46:22	accept 28:15 29:9	agreement 6:13,14 6:21 8:1,9 9:9 11:1 12:4,15 13:4 14:9 20:21 21:1 22:7 24:8,23 33:24 34:1,21 39:19 43:11 49:14 50:20 51:1,3,10,22 52:2,4,6,21,24 53:2,7 55:2,4,14 55:25 58:17,19	amounts 31:4 33:11 35:10 36:15
825 46:22	account 16:2 37:3 41:10 46:7,24	agreements 4:5 5:24 7:11,13 8:12 9:3 12:8,20 13:12 13:14 14:10 20:2 20:25 21:12 28:10 31:15 34:3,18,21 37:16 38:17,19,21 47:6 48:20 49:5 49:11,22 50:16 51:10,18 53:20,23 53:24 54:12 55:23 56:12,19,24 58:1 58:25	amused 60:21
83 42:1	accurate 28:11 31:5 37:3 67:4	alleys 64:7	analysis 14:8 24:7 40:11 42:24 45:13
844 26:14	acknowledge 32:15 49:21 51:12	allow 38:22 43:5 allowance 40:19 allowed 5:21 37:16,23 40:5 58:11 59:2,5 61:3 61:8	analytical 9:1
848 26:15	act 25:19	allows 20:18	analyzed 35:20
85281 3:6	acted 23:3	alternatives 54:2	announced 9:7
858 27:11	action 23:4 41:23		annual 14:21
859 26:3	actions 22:22 23:7 52:7		apex 41:19
862 27:11	activity 23:18		apparently 50:21
863 26:3 40:4	actual 34:8		appeal 14:5 25:4
874 25:4	add 58:8		appear 12:4 18:9 56:24
875 46:15	added 36:12,13		appearance 4:15
876 46:16	additional 10:13 34:22 43:9,14		appearances 4:5
877 26:18	address 6:1		appearing 63:3
878 25:4,24	adequately 51:18		appears 6:9 31:20 38:18 49:9
880 26:9	adjustment 41:24		appellate 42:11
881 26:18	admission 50:15		appendix 27:21 41:2
882 46:16	admissions 26:11		application 42:18
89 11:5	admitted 50:3		applies 7:23 41:13 53:18 55:6
8th 25:4,5 26:3 39:9,12,25 40:3,8 41:1,2,13,16,20 42:1,10 46:10,16 46:17,22	advice 19:13,20 advise 18:10,14 advised 17:25 19:1 affirming 26:9 afford 13:4 15:3 15:14 17:5 18:18 20:11 22:6 aff'd 41:1 afternoon 65:10 65:12 agency 47:15 48:3 48:5,11		apply 40:15 43:3 applying 39:14
9			
9 10:2,8 17:21 35:7			appreciate 5:3 63:4 64:10,12
9010-3 32:7			
919 46:17			
932 46:10			
94 16:11			
95 16:11 17:21			
960 41:20			
98 7:18			
99 11:5 18:20			
9th 26:18 41:5			

[approach - bifurcated]

Page 4

<p>approach 11:13 21:8 30:13 42:8</p> <p>approaches 9:3</p> <p>appropriate 26:5 26:5 42:8 44:21 53:19 64:17,18</p> <p>approval 6:22</p> <p>approximately 22:1 43:13 44:6 45:3,9</p> <p>april 8:24</p> <p>argue 4:24 61:4 62:15</p> <p>argued 5:23 59:20 63:9</p> <p>argues 7:10 8:25 11:21 12:24 13:17 14:10,23 15:19 16:13 17:7 18:23 20:10 21:3 29:21 32:8 34:17 35:18 48:16 49:4,13,17 50:2 51:9,17 52:1 56:11</p> <p>argument 15:23 28:9 37:1 56:8,16 58:22 60:22</p> <p>arguments 7:18 19:21 43:2 54:17 60:24 64:2</p> <p>arising 11:2</p> <p>arizona 3:6</p> <p>arms 64:9</p> <p>arrangement 6:3 10:17,24 31:9 32:24 33:15 36:3 36:19,20 37:4 38:15 43:21 44:1 53:17 61:2</p> <p>arrangements 8:18 9:4,19 34:5</p>	<p>35:23 36:14 39:6 42:15,17 43:18 44:10 57:19</p> <p>aside 63:20</p> <p>asked 23:5</p> <p>aspects 10:16</p> <p>asset 21:8</p> <p>assets 15:25 17:16 20:12 23:15 30:21 44:3</p> <p>assigned 34:2</p> <p>assignment 11:15 33:4,25 34:4</p> <p>assist 18:11</p> <p>assistance 18:15 19:4,6 22:19 47:14 48:6</p> <p>assisted 47:15,20 48:6,7,9,12</p> <p>associated 45:6</p> <p>associates 27:15 32:12 46:9</p> <p>assumably 55:19 58:6,6</p> <p>assume 37:17</p> <p>assuming 29:10 58:9</p> <p>assumption 56:3</p> <p>attach 17:16</p> <p>attempt 18:10 19:24,24</p> <p>attention 36:19 63:2</p> <p>attested 21:25</p> <p>attorney 6:9 7:20 7:23 8:5 9:24 10:10 11:25 12:7 12:14,21 13:8 18:25 23:2,14 24:15,20,24 25:6,8 27:13 28:14,20</p>	<p>39:7,21 40:17 41:22 45:16 49:12 50:4,25 54:7</p> <p>attorney's 10:15 11:2,8 12:10 13:6 37:17 38:5 40:20 43:22 44:9 52:15 63:21</p> <p>attorneys 3:4,11 22:12,22 23:3,6 25:20,23 63:17 64:15</p> <p>attributes 53:11</p> <p>automatically 44:15</p> <p>available 24:5 54:19</p> <p>avoid 4:4 62:8</p> <p>award 26:1 40:22</p> <p>aware 32:22</p> <tr> <td colspan="2">b</td><td></td></tr> <tr> <td colspan="2"> <p>b 1:21 7:9,12 8:7 13:7 16:4 21:2 24:9,9,19 26:2 27:10 28:11 35:24 36:21,25 39:16 40:12 48:13 55:18 56:17 57:9</p> <p>b.a.p. 25:5 26:15 39:9,13 40:8 41:1 41:16</p> <p>b.r. 8:13,19,21 10:3 11:5 25:4,24 26:9,14,21,25 27:11,16 28:1,18 35:17 39:8,12 40:7,9,25 41:16 42:3,16 43:20</p> <p>bachman 40:24</p> <p>back 63:16</p> </td><td></td></tr>	b			<p>b 1:21 7:9,12 8:7 13:7 16:4 21:2 24:9,9,19 26:2 27:10 28:11 35:24 36:21,25 39:16 40:12 48:13 55:18 56:17 57:9</p> <p>b.a.p. 25:5 26:15 39:9,13 40:8 41:1 41:16</p> <p>b.r. 8:13,19,21 10:3 11:5 25:4,24 26:9,14,21,25 27:11,16 28:1,18 35:17 39:8,12 40:7,9,25 41:16 42:3,16 43:20</p> <p>bachman 40:24</p> <p>back 63:16</p>		
b								
<p>b 1:21 7:9,12 8:7 13:7 16:4 21:2 24:9,9,19 26:2 27:10 28:11 35:24 36:21,25 39:16 40:12 48:13 55:18 56:17 57:9</p> <p>b.a.p. 25:5 26:15 39:9,13 40:8 41:1 41:16</p> <p>b.r. 8:13,19,21 10:3 11:5 25:4,24 26:9,14,21,25 27:11,16 28:1,18 35:17 39:8,12 40:7,9,25 41:16 42:3,16 43:20</p> <p>bachman 40:24</p> <p>back 63:16</p>								

 bank 44:15 **bankruptcy** 1:1,12 1:23 6:12,19,23 7:9 8:14,17,19,21 8:24 11:18 12:12 12:16 13:12 16:7 17:5,9,15 18:19 20:15 21:5,15,23 22:2,23 23:5,9,11 23:12,13 24:14 25:4,6,19,21,25 26:21 27:1,11,16 28:2 36:21 37:25 39:5 42:10 43:8 47:8,10,11,13,14 48:6 49:12 50:11 50:25 55:18 58:21 **banks** 46:15 **bar** 46:14 **base** 46:24 **based** 9:13 26:10 29:2 42:20 46:7 59:3 60:6 **basically** 5:5 **basis** 45:13 **behalf** 25:7 **belief** 45:15 **believe** 26:14 46:2 51:6 64:6 **believed** 23:21 **believes** 22:5 **benefits** 14:19 16:14 17:19 **best** 7:14 9:14 13:2 14:7,11 20:24 21:10 24:6 32:21 40:11 **better** 37:11 57:23 **beyond** 36:13 **bifurcated** 5:24 8:12 9:2,9 13:3,14 |

[bifurcated - compensation]

Page 5

<p>13:19 34:21 44:1 54:3 bifurcation 13:10 55:2 binding 55:10 blank 35:10 blind 64:7 block 64:19 bono 18:15 19:4,6 19:8,9 22:13,13,17 22:19,21,22,24 23:14 borrowing 30:5 brief 5:10 61:11 bring 60:19 broad 25:25 61:23 broader 55:8 brought 59:11 brown 40:7 bryant 46:16 bulen 27:10 burden 21:20 burdensome 16:22 business 11:20</p>	<p>case 1:3 4:16 5:15 5:18 6:9,10,20,21 7:7,21,22 8:4,17 8:25 10:14 11:21 11:22,23 12:6,11 13:18,23 15:1 18:16,19 21:6,13 21:19,24 22:21,24 23:4,14 25:6 30:9 30:24 31:25 32:3 35:2,5 36:7 37:25 38:13,14 42:7 43:15 44:2,3,5,8,8 44:12,18,23 45:2,4 45:6,10,12,18,22 47:1 50:11 51:19 52:5,19 53:9 54:9 54:11,14,15,18 55:7,21 56:2,10 58:3 59:5,6,13 60:16,18 61:7,7 62:1,5 63:9,10 65:3,4 cases 5:14,25 13:9 19:9 22:13,14 23:1 31:25 43:8 53:21 55:6 60:15 62:6 caught 36:19 cause 23:20 27:24 causes 34:21 causing 18:6 certain 64:4,5 certainly 32:4 56:4 62:17 64:3 certified 67:3 cetera 30:20 59:14 challenged 38:9 chamberlain 41:15</p>	<p>chance 4:23 62:15 changed 63:18 chapter 5:24 6:19 18:17 21:19 30:23 45:22 charge 9:17 15:5 34:22 44:7,11 charged 10:7 13:8 43:10 44:5 45:18 charges 42:21 43:7 48:13 charging 32:3 chartwell 26:16 checking 16:2 chief 12:24 childress 46:9 choices 55:11 choose 22:24 51:14 52:13 chooses 52:9 choosing 35:5 chose 6:16 cir 46:18,22 circuit 25:4,5 26:3 26:15,18 27:21 39:9,13,25 40:3,8 41:1,2,5,13,16,20 42:1,10 46:10,16 circumstances 42:12 cite 5:14 47:22 cites 8:16 9:6 10:12 28:8 47:24 citing 40:1,9 41:18 claim 34:20 clarification 4:25 clark 26:3 40:4 clear 24:12 30:3 43:9 45:19 53:10 53:24</p>	<p>clearly 15:10,13 24:3 28:6 29:15 34:12,14 35:3,12 44:3 48:10 49:15 53:16 60:11 63:13 63:21 clerk 4:2 client 9:22 11:4 17:25 23:24 43:25 52:8,13 57:12 client's 9:13 31:25 clients 10:18 18:12 19:17 33:6 closely 11:22 coach 64:19 code 7:9 13:13 24:14 25:15 39:2 39:5 47:8,10,13 colin 3:15 collateral 29:14 33:4 collect 11:8,16 collected 47:4 collection 15:25 20:13 23:16,16,18 combined 49:1 come 64:16 comerica 41:25 committed 20:3 communicates 51:22 company 11:7,11 27:20 46:17 compelling 21:4 compensation 7:15,23,25 8:6,7 9:20 10:16 24:16 24:18,21 25:1,9,17 27:7 29:23 30:2,4 32:11,20 33:21 35:24 36:5,24</p>
<p>c</p>			
<p>c 3:1 4:1 27:19,19 39:4,24 47:13,21 58:2 67:1,1 calculate 44:21 calculated 30:20 42:5 calculating 42:13 call 23:16 cancel 7:10 8:9 9:4 21:12 28:9 39:18 cancelled 14:9 21:1 24:8 car 17:11,11 53:15 55:20 carr 8:13</p>			

[compensation - debtor]

Page 6

<p>39:2,17,22 40:16 40:22 41:24 42:9 43:23 complained 62:3,7 complete 17:24 23:17 35:16 37:3 52:18 completely 24:8 completing 23:7 complex 31:8 44:8 53:14,14 55:5,19 complexity 49:11 51:9 compliance 27:22 complicated 23:20 55:13,23,24 complied 36:22 comply 9:24 26:6 47:16 compound 51:9 concedes 44:13 46:4 concern 25:20 38:3 43:25 concerns 10:13 12:25 concluded 65:15 concludes 13:25 17:25 21:11 conclusion 23:25 confer 23:2 conflict 10:24 11:1 19:15 56:18,24 conflicts 22:25 31:15 49:19 51:13 51:15 conform 25:1 36:5 36:8 confused 38:17 57:9</p>	<p>confusing 35:16 38:6 48:23 53:14 55:5 confusion 57:20 congress 25:19 55:16 59:24 conjunction 56:13 connection 7:22 8:4 30:8 consent 55:2,9 consider 13:19 41:9 55:15 consideration 6:7 21:10 considered 11:19 considering 6:2,18 8:17 9:8 consistently 42:4 consists 14:18 conspicuous 53:25 conspicuously 48:10 49:15 construction 27:20 consumer 5:25 consumers 55:9 contact 12:22 contain 37:12 contained 36:15 51:3 contemplation 8:4 contends 13:21 14:13 21:7 29:25 32:14 35:14 37:6 49:8 50:8,23 56:23 contested 31:12,22 32:2,6 44:4 49:23 context 25:21 contingent 33:12</p>	<p>contract 47:14 48:9,25 49:1 contracts 35:6 38:6 49:3 contrary 15:17 34:14 38:18 contrast 54:23 convey 51:18 convinced 60:23 cooperated 27:14 63:21 cooperation 65:2 copy 61:18 corp 26:18 corporation 26:16 42:1 correctable 37:13 corrected 35:11 57:18 cost 11:8 counsel 10:1 11:7 14:4 27:3 30:24 38:4 46:4 49:2 50:6 51:14 57:24 60:24 61:20 counsel's 33:4 counsels 57:9 country 67:10 couple 4:17 64:7 course 53:18 60:4 court 1:1,12 4:10 4:14 6:22 7:10,24 8:8 10:4,9 11:18 12:19 14:1,2 21:12 24:16 25:25 28:7,9,13,19 37:15 37:23 38:3 39:18 40:20 41:9,21 46:5,11,19 47:19 48:18,22 54:20 57:11,15 59:5</p>	<p>62:23 63:6 court's 12:25 34:19 36:19 courts 8:11,17 27:5 41:6 43:1 court's 2:1 creating 10:25 credit 11:14 12:1,3 30:1,14,20,22 31:1 31:7 33:3,10,15,19 creditor 25:22 creditors 16:24 17:16 18:12 23:19 criticized 48:20 ctr 41:3 currently 14:18 customary 42:19 43:22</p>
			d
			<p>d 4:1 40:1,2 66:1 daniel 3:8 date 8:2 48:5 67:15 day 5:19 12:15 50:16 63:18 days 9:21 35:25 48:4 63:16 deal 5:2 23:18 dealing 16:24 dealings 9:12 dealt 6:16 13:22 debt 10:25 16:5,9 16:12 20:15 21:17 21:21 30:18 33:5 38:8 42:19 47:10 47:15 48:2 debtor 1:9 7:21 9:11 12:9,10,17,22 13:4,6 16:21,23 24:15 25:7 28:15 28:16,24 37:24</p>

[debtor - drafting]

Page 7

<p>38:10,16 39:6,7 42:7 49:2 51:11 52:20 54:19,24 debtor's 10:10 11:25 12:7,14,21 13:2,6,8 21:10 28:20 40:16 debtors 11:7 17:24 55:5,16 debts 18:5 21:14 22:10 44:4 59:9 deceive 33:17 december 37:20 deception 31:20 34:13 35:1,13 37:14 decide 58:19,20 61:5,15 decided 24:4 40:14 deciding 6:6 9:11 61:3,20 decision 2:1 4:20 4:22,24 5:12,20 11:6 13:18 24:1 46:24 55:6 59:2 60:8,13,17 decisions 9:12 declined 8:11 50:11 deduct 45:23,24 deducted 44:15 defects 49:6 definition 47:10 delineated 25:14 demonstrate 24:7 40:12 47:6 denied 27:4 density 48:19 deny 26:1</p>	<p>department 3:10 depending 59:12 deposition 15:10 15:15 16:10,25 17:21 18:20,21 19:9 20:5,7,22 22:8 28:25 33:21 35:6 36:9,16 45:20 49:25 52:10 52:15,22,25 53:4,8 60:6 63:11 64:13 derived 25:18 describe 36:14 describing 42:17 desire 11:2 desperate 18:24 despite 18:17 21:17 22:1 detail 63:2 detailed 53:24 determination 28:3 40:15 determine 27:6 36:24 41:6 46:11 determining 41:12 42:8 46:5,18 dewoskin 40:1 difference 63:22 different 21:9 53:3 60:17 62:2 difficult 16:22,25 45:13 56:12 directive 9:7 directly 10:6 31:15 disallowed 7:1 discharge 6:13 15:20 18:2 23:22 dischargeable 10:25 18:1 19:22</p>	<p>discharged 16:6,9 16:13 20:15 21:18 22:11 58:23 59:10 59:16 discharging 19:24 21:20 disclaimer 48:24 disclose 26:10,12 26:23,23 28:5 29:12 31:6 34:4 34:20 disclosed 25:17 29:22 33:14,15,18 35:23 52:8 disclosure 10:16 26:7 27:2,23 28:14,16,19,23 29:7 31:11,14,23 32:15 34:7,24 35:9,19,24 36:8 37:2,7,9 53:7 57:9 57:11,14 disclosures 7:16 13:7 24:11,13 28:11 30:3 31:5 32:10 35:15 36:2 36:12,18 37:11,12 38:6,12,18 55:15 55:22 56:14,18 57:2 62:4,8 discretion 26:1 27:6 46:5 discussed 17:22 33:1 35:21 37:10 38:23 40:10 59:19 discusses 23:1 discussing 11:5 discussion 10:13 disgorged 6:25 47:4</p>	<p>disgorgement 24:11 26:4,10,24 34:16 35:2 39:3 40:5 dismiss 32:2,2 dispute 5:5 distinguishable 38:13 54:17 distress 38:9 district 1:2 8:15 8:20,22,24 11:19 22:15 26:21 27:1 27:11,17 28:2 47:1 62:12 docket 7:17,18,18 9:5 11:16,23 13:20,23 14:2,5,11 14:12,15,15,20 15:1,6,21,21 17:6 17:12,17 18:3,12 19:1,17,25 20:13 21:6 28:12 29:1,4 29:10,23,24 30:5,6 30:11,15 31:12,13 31:16 32:12,17,24 34:10,11,22 35:10 35:16 36:1,10,17 37:4,9 40:17,17 47:25,25 48:17 49:6,12,16,19 50:7 50:12,17 51:3,7,15 51:20,24 56:14,21 57:2,6 documents 48:21 53:15 54:24 55:12 55:20 56:5 doing 4:19 7:4 64:10 doubt 55:1 drafting 27:8,13</p>
---	--	--	---

[draws - federal]

Page 8

draws 30:25 drew 34:19 due 33:6 dunlap 27:20	57:12 entering 20:25 entire 19:21 27:3 40:13 52:9 entirely 14:18 54:16 entirety 7:1 entitled 43:12 entity 11:3 24:22 enumerates 52:19 error 28:6 29:8 35:11 errors 24:12 27:8 27:13 37:7,13 established 25:13 estimated 45:2,8 estimation 45:14 et 30:20 59:14 evaluating 9:1 evasion 25:21 event 44:20 59:12 60:8 eventually 33:10 evidence 15:17 17:3,8,14 19:5 22:18,20 23:8 24:12 33:16 34:13 38:15 44:21 49:14 53:13,19 56:1 57:10 59:4 60:5 64:16 exact 53:7,25 59:3 exactly 52:19 examine 36:20 example 8:13 17:7 48:22 49:21 55:15 58:18 59:1 exceeded 21:25 exceeds 8:7 39:17 exception 16:1 25:16	excess 47:2 excessive 7:2,8,16 8:10 39:20 40:6 43:22 46:25 exchange 11:9 exclude 49:23 excuse 17:9 21:15 25:11 37:25 execute 48:8 exemplifies 13:18 exempt 16:15 20:12 23:15 exemption 16:20 17:23 exhibit 20:5 28:25 36:9,16 45:20 52:10,15,22,25 53:4,8 exigency 21:4 exist 23:1 expect 57:24 expected 55:10 expended 41:22 45:15 expenses 21:25 experience 21:14 45:17 46:8,19,23 46:25 explain 49:15 explained 17:4,8 17:15 54:5 explains 48:10 52:6,17 53:2 explanation 53:25 54:9 explore 22:22 64:4 exposed 27:3 express 48:23 extension 11:13 30:14	extensive 48:20 extent 8:10 39:20 40:5 41:9 44:11 extra 32:3 35:4 extremely 63:16 63:25 64:1,21
e e 1:21,21 3:1,1,8 4:1,1 26:2,17,17 26:17,20 27:10 39:10,10,11,24,24 40:1,2,25 41:4,18 66:1 67:1 earning 16:16 earnings 16:14 easily 55:22,24 62:4,7 eastern 8:14 ecro 1:25 educational 16:6 edward 3:4 effect 6:18,20 7:7 efforts 20:13 egregious 14:24 either 50:15 51:7 54:7 61:22 elects 9:22 eliminate 22:3 emerge 51:2 emphasize 60:9 enable 17:10 ended 10:19 enforceability 6:3 6:14 58:16 enforced 47:18 engage 34:25 engagement 50:5 52:4,9,13 53:11 54:3,6 55:14,25 56:9 57:13 enter 13:3 entered 6:21 12:1 12:7,15 24:3	f f 1:21 26:20 39:10 39:11 40:25 41:1 67:1 f.2d 41:20 f.3d 26:3,18 39:25 40:3,4 41:4 42:1 46:10,16,17,22 fact 5:7,9,13 14:17 14:24 29:3,17,18 31:24 44:2,22 55:4 factored 10:19 factoring 11:3,7 11:10 factors 41:11 facts 11:22,23 13:22,23 18:11 29:2 61:6,7,25 fail 17:24 30:3 failed 18:14 19:13 32:15 37:2 56:9 fails 14:8 24:7 40:11 47:5 58:1 failure 10:15 26:6 26:10,12,22,23 28:5 34:20 44:13 fairly 62:1 fairness 63:2 familiar 46:13 favor 10:10 favorable 11:3 federal 16:16 27:20 36:20 47:19		

[fee - good]

Page 9

fee 5:24 6:3 8:12 9:4,19 10:6,17,23 11:1 12:11 13:3 13:19 18:17,19 19:21 20:7,21 22:7 23:21 27:3 29:4 30:18,23 31:15 32:24 33:4 35:22 36:3,7,14,20 38:14 39:6 40:13 42:14,14,17,21 43:5,6,13,21 44:1 44:3,24 45:1,11,18 46:7 52:6,8 54:7,8 55:3 58:8 59:17 59:19,21 61:8 feel 64:14 fees 5:6,21 6:25 7:8 9:16 10:5,19 10:23 11:8,16 12:11 24:11 26:1 26:5 32:16,17 33:11 37:17,21,23 38:5,22 39:4 40:6 40:20 41:7,13 42:13 43:3 45:6 46:6 48:13 51:24 52:15 58:5 59:2 59:16 63:21 66:6 felt 21:13 23:11 fiegen 39:10 figure 41:25 file 5:7,8,14,18 7:24 17:23 21:5 21:19,23 23:12,13 24:15,15 60:11 filed 5:19 6:10,23 9:21 12:16 18:19 23:11 25:12,15 35:25 48:8 50:17 54:9,11 57:13	59:20 65:9 files 25:6 filing 8:2 9:24 12:11,12 18:16,17 18:19 19:7 22:2 22:23 44:24 50:20 52:7 58:8 59:18 filled 14:25 16:21 28:14 36:15 final 5:11 37:19 finance 9:17 financial 9:14 21:13,20 26:16 financially 38:9 financing 30:19 33:14 43:16,18 44:9 find 34:25 38:12 45:17 53:22 finding 43:20 findings 5:7,8,13 firm 32:12 39:11 first 4:18 48:5 57:14 fisher 1:22 five 48:4 flat 42:14,14,17,21 43:13 45:11 floating 7:5 60:14 fokkena 39:11 followed 59:1 following 9:6 13:1 footnote 38:11 42:16 foregoing 27:12 67:3 form 16:20 25:2 32:7 35:23 36:4,6 36:9,10,13,17 38:7 55:18	formalized 19:23 forms 17:23 formula 42:20 found 28:19 31:5 48:22 53:13 58:25 fox 46:9 framework 9:1 frequency 53:3 fresh 6:22 11:12 11:19 12:1,21 13:5 15:4 19:16 20:2,19 28:21 29:18,25 30:5,10 30:10,13,18,24 31:4 32:16,20,22 33:2,7,12 37:4 43:11,16,18 49:9 51:19,23 friend 15:5 20:18 22:4 front 10:21 frye 26:20 full 6:8 22:9 27:2 29:4 fully 9:19 35:23 fundament 53:10 fundamental 53:11 funding 6:22 12:2 12:21 13:5 15:4 20:19 28:22 29:18 30:5,10,10,25 31:4 32:16,21,22 33:2,8 33:12 37:4 43:10 43:11,16,19 49:9 51:23 funding's 11:13,20 20:2 30:1,13,18 51:19 further 6:2,18 10:4 12:22 13:21	14:21 15:2,19 16:5,24 19:19 20:14 21:3,24 22:17 25:14 30:7 30:16 32:4 35:3 35:18 36:4,20,22 37:6 38:15 44:17 49:8 50:8 52:17 54:5 55:8 56:23 57:16 future 57:18 62:6 62:9,10
g			
g 4:1 26:2 32:7 39:10 46:21 gage 28:1 games 64:16 gaps 35:19 garnish 17:17 garnished 16:21 17:20 garnishment 16:15 garrison 3:8 4:11 4:12 62:24 63:1 65:14 generally 43:7 give 4:23 29:15 62:11 given 23:2 gives 29:15 giving 37:24 go 4:3,17 58:16,21 59:13 62:20,25 64:7 going 4:2 5:10 58:21 gonzales 27:18 good 4:2,8,10,12 38:19 65:7,12			

[gorski - kentucky]

Page 10

gorski 26:25 governs 39:6 40:19 grace 20:18 granted 10:9 great 46:11 gross 14:21 grounds 26:23 guidelines 25:13 <hr/> h <hr/> h 26:17,17 40:2 46:21 hand 11:12 27:5 hanig 46:21 happened 61:16 happening 61:24 happy 64:14 hardship 59:14 hazlett 8:23 9:7 10:1,4,7,9 11:4,6 11:11 13:16 21:9 35:21 43:24 healthy 65:6 hearing 2:1 4:24 held 42:4 helen 26:17,17 higher 52:8 54:8 55:3 highlighted 36:14 hire 50:11 hold 23:13 53:20 holding 13:14 hon 1:22 honor 4:8,12 62:21 65:14 hope 65:6 hopefully 61:12 hoping 61:21,22 host 55:11 hour 46:12	hourly 41:23 42:6 46:12,18 hours 41:22 42:6 54:11 hyde 2:25 67:3,8 <hr/> i <hr/> idea 57:8 identifies 52:11 ii 47:5 illinois 28:2 illusory 50:6 immediate 11:9 immediately 9:24 impact 51:18 impermissible 5:25 8:12 implication 56:20 important 34:4 60:18 61:19 64:24 importantly 53:12 imposition 27:25 impressed 63:8,16 63:25 64:1,21 improper 10:22 inaccuracies 27:6 28:3 inaccurate 24:10 31:11 34:7 inaccurately 29:22 inadequate 7:17 13:7 inadvertent 26:11 26:22 27:8,13,23 inappropriate 42:13 include 24:20,22 included 37:21 45:4 48:23 51:10 including 8:18 9:12,17 10:14	35:22 42:19 50:24 54:6 61:1 income 14:18,22 14:25 15:8,9 17:20 20:12 22:1 37:24 inconsistencies 57:16 incorporated 5:11 incorrect 49:24 increased 49:9,10 incur 18:1 incurred 38:8 independent 49:2 51:14 indicates 14:4 57:3 indiscernible 63:5 indulged 64:11 information 37:13 informed 55:1,9 initial 28:14 35:9 37:7 inquiries 27:14 36:23 inquiry 31:8 60:4 installment 9:17 52:14 60:5 installments 54:8 59:25 instance 25:14 instances 55:13 instructed 48:17 insufficient 38:6 intelligent 23:10 38:20 intent 33:17 intentional 31:20 34:13 35:1,13 37:14	interest 7:14 9:14 9:15 10:24 13:3 14:7,11 19:16,17 20:24 21:10 23:6 24:7 40:11,22 44:22 51:13 interrupt 4:21 intimately 46:13 involve 13:10 involved 11:6 involvement 51:19 involves 11:13 30:14 ire 34:19 issue 6:1,4,14 24:4 28:13 35:8 54:21 55:8 61:11 62:16 64:3 issues 6:15,24 19:14 55:11 58:15 60:19,20,23 61:25 <hr/> j <hr/> j 1:22 41:4 46:15 jane 1:7 4:3 jastrem 41:4 jeffrey 46:17 jensen 26:13 johnston 41:25 judge 1:23 63:3 65:13 judgement 18:25 junction 19:25 justice 3:10 <hr/> k <hr/> k 39:11,11,24 40:1 40:25 41:15 karsch 26:2 keep 17:11 50:10 kentucky 8:15
--	---	--	---

[kind - minimum]

Page 11

kind 7:6 22:20 59:13 60:14 knew 21:17 32:1 44:18 know 5:1,4 46:25 58:6 60:12 knowledge 18:17 46:20 knows 29:3 kreuziger 3:15 4:6 4:8 62:19,21 65:13 kula 41:15,15 42:16	lee 46:21,22 left 35:9 legal 9:16 22:14 23:4,7 28:24 35:5 39:22 48:24 49:2 67:9 legalese 48:21,23 legally 55:10 legislative 61:24 lender 29:13,14,16 33:16,18 43:16 length 48:18 49:10 lengthy 49:10 53:24 lessen 21:19 letter 33:16 level 34:16 60:2 liable 31:3 life 55:11 limited 14:14 line 4:6,11,15 11:14 12:1,3 16:11,11 17:1,1 18:22,22 19:10,10 20:8,9 30:1,14,22 30:25 31:6 33:2,9 33:15,18,23,23 39:11 49:25 50:1 66:4 lines 17:21 18:20 19:11 20:8,8 33:22 35:7 62:17 list 5:14,18 10:15 45:21 52:23 listed 15:24 little 17:3,4,14 live 64:22,23 living 15:5 llc 27:20 46:9 load 53:15	loan 16:6 21:18 33:7 53:15 55:20 55:20 loans 59:11 local 6:7 9:25 24:25 25:2,14 32:6,7 36:4,4,6,8 36:10,13,17 46:13 lodestar 40:14 41:14,21 42:4,12 42:19,24 43:2,4 45:12 look 54:20 59:24 luker 39:24 40:7	maximum 53:2 mccrary 27:19 meaningful 51:2 means 14:14 mechanism 38:4,5 meet 54:12 meetings 54:10 meets 39:2 47:9 52:5 members 32:12 mendes 27:18 mention 62:15 mentioned 63:7 merely 19:23 28:5 met 62:4,7 method 40:15 41:14,21 42:5,12 42:25 43:2,4 methods 9:13 michael 46:15 milner 8:19 10:2 11:21,22,25 12:2,4 12:6,9,12,14,18,19 12:23 13:13,15,17 13:22 14:2,5,14 20:24 21:4 28:8 28:13,18,18 29:8 32:9 34:19 35:15 35:17 37:15,23 38:13,25 43:20 48:17,18,21,22 51:8 54:15,19,21 59:2,4 milner's 12:25 mineola 67:12 minimally 19:13 minimized 63:21 65:2 minimizing 64:23 minimum 16:16 19:14
l	l 26:17 27:10 40:25 41:16,18,18 41:19 labarge 26:2 labor 43:14 lack 6:7 lamie 39:14 language 49:19,22 large 25:18 59:9 largely 50:6 larger 59:5 latitude 46:11 law 3:3 8:17 16:1 39:10 41:3 lawsuit 59:11 lawyer 9:23 lawyers 9:14 layman 61:13 lead 24:10 35:20 lease 53:15 55:20 leaves 27:2 leaving 43:12 54:20 ledanski 2:25 67:3 67:8	m	
	m 27:19 40:2 41:4 mahendra 40:2 maintain 11:2 maintains 15:2 17:2 18:8 19:19 20:23 30:7 32:19 33:20 51:22 majority 16:5 20:14 making 17:11 manage 29:14 management 30:19 31:7 33:19 manager 29:19 mandate 56:9 mandated 55:16 manner 61:13 markets 46:20 mary 1:7 4:3 material 47:16,22 52:2 57:5,18 matter 1:5 4:3 64:24 matters 31:12,22 32:6 44:4 49:23		

[minnesota - paid]

Page 12

minnesota 1:2 16:3,17,20 27:12 minor 57:16 minute 38:23 minutes 50:22 miscite 5:15 misleading 28:19 mistake 31:19 34:12,15 35:12 mistakes 37:13 mn 1:14 3:13 model 11:20 money 10:18 30:5 44:14 month 14:19 20:4 20:21 58:7 59:22 monthly 15:9,11 21:25 22:6 34:8 moral 44:25 morning 4:2,9,10 4:13 mortgage 41:25 55:21 motion 4:4 32:1,2 40:21,21 62:10 move 22:5 multiplication 45:13 multiplies 41:22 multiplying 42:5 mute 4:18	nearly 15:8 54:16 neben 26:15 necessarily 42:23 necessary 9:18 41:24 necessitate 27:8 necessitates 35:1 necessitating 34:16 need 5:1 17:23 54:23 needed 15:10 20:20 63:23 negative 14:25 negligent 26:11 negotiating 18:12 neither 51:22 never 45:25 nevertheless 16:8 30:12 31:18 33:1 37:16 new 20:15 27:1,17 50:6 64:3 nine 50:22 non 10:25 18:1 27:22 normal 42:19 43:13 46:7 normally 45:21 north 1:13 3:5 northern 8:22 28:2 note 30:16 38:10 42:10 54:15,22 58:24 59:19 62:2 noted 48:18 notes 15:24 20:1 31:14 notice 29:16 31:16 56:13 57:1,17,22	notion 50:3 novelly 41:18 number 8:23 9:5 11:16,23 13:20,23 14:3,5,12,12,15,15 14:20 15:1,6,21,22 17:6,12,17 18:3,13 19:1,18,25 20:13 21:6 28:12 29:1,4 29:10,23,24 30:6,6 30:11,15 31:13,13 31:16 32:12,17,24 34:9,11,11,23 35:10,16 36:1,10 36:17 37:5,9 40:17,18 42:6 47:25,25 48:17 49:6,12,16,20 50:7 50:12,17 51:3,7,15 51:20,24 56:14,21 57:2,6 59:9,9 60:19,20 numerous 22:14 ny 67:12	oil 41:19 okay 4:16 oklahoma 8:20,22 11:19 old 14:17 67:10 once 6:8 operative 55:12 opinion 7:4 63:22 opportunity 25:23 opposed 11:14 option 10:19 23:2 options 19:1 52:18 53:3 54:7 oral 60:22 64:1 order 5:10,12 8:9 18:2 24:2 38:2 39:19 52:13 61:11 ordered 12:20 ordering 37:19 orders 65:8 original 37:8 outcome 37:25 overreaching 25:23
n	n	o	p
n 3:1,12 4:1 26:17 27:10 39:10,11 40:2,2 41:18,19 46:21 66:1 67:1 name 5:17 narrow 54:13 56:7 nationally 22:15 nature 41:9 61:24	note 30:16 38:10 42:10 54:15,22 58:24 59:19 62:2 noted 48:18 notes 15:24 20:1 31:14 notice 29:16 31:16 56:13 57:1,17,22	o 1:21 4:1 39:11 40:1,25 41:18 67:1 object 63:14 64:17 objected 63:14 obligated 35:4 obligation 6:11 15:12 18:1 23:22 23:24 29:13 44:25 obtaining 50:5 occur 65:4 occurred 44:5 59:7 65:3 october 67:15 offered 9:12 19:5	p 3:1,1 4:1 39:24 40:25 41:2,2,19 p.a. 41:18 page 10:8,11 15:16 16:10 17:1 20:5 33:22 35:22 38:1 38:10 49:3 66:4 pages 10:2 16:11 36:9 39:12 paid 7:25,25 10:20 12:10 23:9 24:16 24:17 25:9,9 29:16 30:8,11 33:11 37:21 44:17 47:2 51:24 54:3 58:7,10

[pain - proper]

Page 13

<p>pain 65:3</p> <p>palans 41:19</p> <p>panel 25:5 42:11</p> <p>paperwork 23:17 43:15</p> <p>paragraph 16:3 20:16 36:13 52:7 52:11,17,24 53:4,6</p> <p>paragraphs 36:12</p> <p>paralegally 55:17</p> <p>parallels 53:7</p> <p>park 26:17</p> <p>parklex 27:15</p> <p>part 4:20 24:1 25:18 28:25</p> <p>particular 9:8 60:16</p> <p>particularly 44:14</p> <p>particulars 24:23</p> <p>parties 5:4 6:4 40:14 58:20 60:19 60:22</p> <p>party 40:22</p> <p>passage 52:2</p> <p>patience 64:10</p> <p>paul 1:14 3:13</p> <p>pay 6:12 12:17 18:2,18 20:3,19,20 28:17,24 31:3 33:6 35:4 43:17 44:13,23,25 54:8 55:3 58:12 59:18 59:22,25 60:5 61:9</p> <p>paying 10:19 17:10 29:18,19</p> <p>payment 6:7 8:1 8:10 9:13 15:15 22:6 30:19 31:2 32:23 34:10 37:19 39:19 44:14 48:14</p>	<p>53:1,2,3 54:4 57:4</p> <p>payments 9:18 13:5 15:4 17:11 20:3,11 22:9 25:20 30:17 32:24 34:8,9,9,15 37:20 38:4 52:7,14 56:19,21</p> <p>pays 30:9 32:16 43:25</p> <p>pelofsky 40:24,25</p> <p>pending 6:20</p> <p>people 64:14</p> <p>percent 10:20 11:10 13:9 15:8 32:23 51:23 60:1</p> <p>percentage 30:21</p> <p>perform 45:25</p> <p>performed 38:24 45:3,9,14</p> <p>performing 6:4</p> <p>performs 45:22</p> <p>permits 40:20</p> <p>permitted 42:18</p> <p>person 32:11 47:15,20,20 48:7,9 48:12 54:10</p> <p>personal 6:19</p> <p>person's 48:7</p> <p>peterson 40:24 42:3</p> <p>petition 5:6 6:7 7:11,11 8:2 9:21 10:5,7,23 11:1 12:8,8,12,15,17,20 12:20 13:11,11 19:23,24 23:22 30:23 35:25 37:22 38:8 44:17,24 45:1,5,7,23,23 46:2 48:8,19,19,25</p>	<p>49:1 50:6,12,17,20 50:21 51:1,10 52:6,12,14,20,21 52:24 53:1,6 58:19 59:22</p> <p>phones 4:18</p> <p>play 64:16</p> <p>please 4:18,21</p> <p>pleasure 63:3,12</p> <p>pledged 30:17</p> <p>pledges 30:24</p> <p>pllc 3:3 27:19</p> <p>plus 59:15,18</p> <p>point 4:19 57:21 59:10 61:7</p> <p>points 14:16 31:10 34:6 50:14 56:17</p> <p>polite 63:13</p> <p>positive 59:6</p> <p>possibility 27:3</p> <p>possible 53:19</p> <p>post 5:6 6:7 7:11 10:5,7,23 11:1 12:8,15,17,20 13:11 19:23 23:22 30:23 38:8 44:17 45:1,22 48:19,25 50:6,12,19,25 51:10 52:14,20,21 52:24 53:6 59:22</p> <p>potential 44:4 49:19 51:13,15</p> <p>potentially 62:8</p> <p>poverty 60:1</p> <p>power 26:1</p> <p>practical 17:5</p> <p>practice 34:19 63:17</p> <p>pre 6:12 7:11 12:8 12:19 13:11 19:23 37:21 44:24 45:5</p>	<p>45:7,22,23 46:2 48:19,25 52:6,12 53:1 54:3 58:18</p> <p>precedent 42:23</p> <p>predicates 54:16</p> <p>prepay 52:9 54:7</p> <p>presented 54:2</p> <p>presume 55:17</p> <p>prevailing 46:20</p> <p>previous 31:25 32:3</p> <p>previously 17:22 33:1 37:10 40:10</p> <p>prime 9:7</p> <p>principal 7:3 60:12</p> <p>prior 12:11 21:15 21:24 22:23 48:7 50:16 58:21</p> <p>privilege 63:4</p> <p>pro 9:22 18:15 19:4,6,8,9 22:12 22:13,17,19,21,22 22:24 23:14</p> <p>problem 62:9</p> <p>procedural 62:16</p> <p>procedure 36:21</p> <p>proceed 9:22</p> <p>proceedings 65:15 67:4</p> <p>process 23:11</p> <p>produce 44:21</p> <p>produced 15:17</p> <p>professional 63:24</p> <p>pronouncement 7:6 60:14</p> <p>pronouncements 61:23</p> <p>proof 23:16</p> <p>proper 31:8</p>
--	--	---	--

[properly - representations]

Page 14

<p>properly 18:25 propriety 8:18 9:8 protections 25:22 protego 3:3 prove 59:13 provide 9:1 25:22 37:2 48:12 52:12 provided 52:20 53:13 54:1 provider 19:8 providers 19:6 22:13 provides 7:20 33:2 39:16 47:14 48:5 49:11 provision 25:18 provisions 51:11 53:21 purported 49:22 49:23 purportedly 18:1 purposeful 28:4 pursuant 25:12 purview 28:6 pushed 23:8 put 4:18 60:10 62:14 putting 19:16 63:20</p>	<p>r</p> <p>r 1:21 3:1 4:1 26:2 26:20 27:19,19 40:2 41:4 67:1 raise 62:18,20,25 raised 6:15 rarely 63:13 rate 41:23 42:6 43:22 44:22 45:11 45:16 46:12 rates 46:19 58:16 reach 14:1 read 5:8,10 49:18 50:25 61:14 63:11 63:12 reading 4:20 60:11 64:13 really 6:12 19:22 58:18,19,20 reason 15:3 51:6 60:12 reasonable 8:8 9:18 36:24 39:17 39:23 40:16 41:23 42:5,6,9,13 45:16 45:18 46:5,12,18 56:8 59:17 reasonableness 9:2 41:7,12 50:4 reasonably 37:3 46:12 reasoning 38:2 reasons 5:22 7:4 14:2 receipt 11:9 receivable 29:15 29:20 30:23 31:7 33:19 34:1,2 receivables 33:5 receive 55:16 58:11</p>	<p>received 30:4 33:7 receives 33:10 44:16 receiving 28:20,21 28:22 29:3 recharacterize 34:3 recharacterized 33:25 recognize 25:5 recognized 42:11 recognizes 29:6 30:13 recognizing 27:22 43:25 recommendation 49:1 recommended 19:4 record 4:3,6 5:11 17:3 36:23 62:14 62:20,25 63:15 67:4 recourse 33:2 recovery 33:13 redding 25:3,24 26:9 39:8 40:9 reduce 15:10 reduced 5:22 7:1 58:5 66:6 reevaluated 22:16 refer 22:13 referenced 43:2 reflects 25:19 refund 40:13 regarding 6:14 9:25 29:8 43:3 49:19 regardless 15:11 33:10</p>	<p>reiterated 52:23 rejudgement 10:10 related 43:15 relationship 11:3 relatively 44:3 relevant 29:10 41:11 relied 18:24 relief 17:5 47:10 47:15 48:2 relies 51:8 relieved 18:7 59:17 reluctant 46:23 rely 44:24 46:19 54:23 remain 65:6 remainder 65:7 remains 15:20 removed 55:1 rendered 8:3,3 24:17,18 25:10,10 47:3 rent 15:6,7,9,11,14 17:10 20:21 22:3 22:6 renting 15:14 repay 33:9 repayment 33:3,5 repeat 34:18 reporting 30:20 represent 9:11 31:12,21 32:5 42:7 representation 6:8 29:9 30:9 48:24 49:24 representations 43:8 56:25</p>
<p>q</p> <p>qualifications 19:5 qualify 22:19 question 56:19 questionable 15:21 18:3 32:21 quickly 5:16,16 quite 38:20 60:17 62:2 quote 9:10 26:11 quoting 26:15 27:18 46:15,21</p>			

[represented - seasoned]

Page 15

<p>represented 32:1 32:9 57:23 representing 7:21 11:4 39:7 50:10 represents 57:5 requested 23:7 40:23 require 6:8 22:22 42:24 61:17 required 12:16 21:5 22:12 23:17 31:22 32:5 34:3 34:24 40:13 42:7 43:14,17 44:19 51:11 56:20 58:12 58:13 61:9 requirement 39:2 52:3 requirements 26:7 27:23 47:17,22 52:5 54:13 56:6,6 57:6 requires 21:9 24:14,19 25:7,15 39:21 respect 48:25 response 27:14 responsibilities 31:16 57:1,17,22 responsibility 56:13 rest 44:25 result 14:1 25:21 35:20 38:24 43:10 58:4 59:6,18 62:1 resulted 38:7 results 21:9 retain 9:23 51:23 retainer 10:20 14:8 24:8 37:16 38:17 50:16 54:12</p>	<p>56:11,18,24 58:1 retaining 32:23 retired 14:17 return 8:9 39:19 revealed 9:20 36:3 review 36:18 49:3 50:22 reviewed 37:8 reviewing 50:4 right 11:8,15 51:13,15 rights 57:17,22 rise 34:16 risk 44:12 risky 44:14 road 3:5 67:10 robert 1:13 3:12 roughly 16:8 34:9 rouse 25:3 39:8 rubric 35:21 rule 9:25 13:7 24:19,25 25:13,14 26:7 28:4,11 32:6 36:4,21 56:17 59:23 ruled 58:24 rules 4:17 6:8 25:15 39:3 rulings 66:3 run 56:12 russell 3:4 4:11 5:21 6:9,12 7:12 11:14 14:4,25 15:12 16:25 17:4 17:8,14,19,25 18:9 18:14,21 19:7,9,13 19:15,20 20:1,4,7 20:25 22:20 23:3 23:8,19,21 24:2 28:25 29:3,7,9,12 29:22 30:4,8,11,15</p>	<p>30:18 31:3,6,21,24 32:5,9,17,20 33:6 33:7,9,14,17,20,21 34:2,22,25 35:12 36:9,16,22 37:8 40:12 42:21 43:5 43:7,10,12,15,18 44:11,20,22 45:2,8 45:20 46:4 47:4,9 49:18,21,25 50:3,9 50:17 52:10,12,15 52:21,25 53:4,8,12 53:23 54:5 55:3 57:13 58:11 61:17 russell's 5:5 6:19 6:25 7:8,15 9:4 11:15 14:10 18:24 20:6 24:10 28:10 28:23 29:15,20 30:3 31:11 33:13 34:18 35:9,15 36:2,7 37:2,12 39:1,4 43:3 45:5,8 45:11 47:6 49:5 49:14 52:4,6 55:14 56:5,8,14,17 57:4 58:5 64:25 ryan 1:7 4:3 6:11 6:15 7:12 10:13 11:16 14:10,17 15:3,15,24 16:8,10 17:4,9,18,20,22 18:5,10,15,18,20 18:23 19:13,20 20:3,10,18,20,22 21:5,13,19,22,24 22:2,19 23:1,8,10 23:13 24:2 28:10 29:16,23 30:8 31:2,3,12,22 32:5 32:15,22 33:11,13</p>	<p>34:7,14,18 35:3,6 38:14 40:13 43:17 44:23 47:3,7 49:5 50:5,9,15,19 51:6 51:24 52:18 53:13 53:19,23 54:2,6,25 55:9,19 57:5,8,12 58:7,12 61:9,14,18 ryan's 7:13 11:23 13:23 14:11,14,21 14:24 15:20 16:2 16:5,14 17:16 20:14,24 29:13 30:16 31:25 44:2 44:13 45:4,10 50:15 53:9 56:20 64:23</p>
			s
			<p>s 3:1 4:1 40:1,25 41:4,19 safe 65:6 sanction 26:6 27:25 sanctions 27:9,12 sand 46:17 satisfactory 37:24 38:24 satisfy 13:15 56:5 56:9 schedule 14:24 57:5 schroeder 25:3 39:8 scope 49:16,24 56:25 57:4,21 scottsdale 3:5,6 scrivener's 28:6 se 5:25 8:12 9:22 61:2 seasoned 50:24</p>

[second - supplement]

Page 16

<p>second 60:4</p> <p>section 7:9,12,20 13:12 16:7,17,20 21:2 24:9,13,20 25:7 26:7 36:24 39:5,16,21 40:19 41:5,7,8 42:9 46:6 47:11,13,17,17,18 47:21,23,24 48:2 48:15 52:3 54:13 55:18 56:6,9 58:2 58:25</p> <p>sections 47:7,12</p> <p>secured 33:3</p> <p>securing 30:21</p> <p>security 14:19 16:14 17:19 30:17 44:16</p> <p>see 5:17 8:13 10:2 13:13 16:3,7,16,25 20:15 26:20 27:10 27:15 32:6 35:17 36:9,15,20 37:18 37:18 39:10 40:4 41:3 42:3 43:20 43:24 46:9 47:11 50:15,19 52:24 64:14,15</p> <p>seeing 65:9</p> <p>seek 18:15,16 49:2</p> <p>selected 38:4</p> <p>semi 64:22</p> <p>sense 44:7</p> <p>separate 50:3 52:21</p> <p>september 1:16</p> <p>serious 18:10 19:14</p> <p>service 28:24</p> <p>services 8:3,8 9:16 9:23 10:5,7 12:17</p>	<p>22:17 24:17 25:10 30:19 35:5 39:18 39:23 41:10 42:22 45:3,5,10,25 47:3 48:6,11,14 49:16 50:12 52:11,19,23 54:1 56:25 57:4 57:21</p> <p>serves 39:12</p> <p>set 13:15</p> <p>sets 41:5</p> <p>settled 26:4</p> <p>share 24:21,24 32:10</p> <p>shared 24:21</p> <p>shares 32:17</p> <p>sharing 24:23 32:20 33:21</p> <p>shifting 10:22</p> <p>show 14:8 23:23 24:2 31:18 39:22 58:1</p> <p>shows 49:14</p> <p>signature 67:7</p> <p>signed 55:19</p> <p>significant 16:12 19:15,21 38:7</p> <p>signing 11:7</p> <p>signs 52:20</p> <p>similar 12:5 13:22 29:7</p> <p>simple 44:3,8 47:1 56:7</p> <p>simply 35:9 60:25 64:18</p> <p>single 34:10</p> <p>sir 63:6</p> <p>slay 46:15</p> <p>slipped 10:6</p> <p>smitty's 26:14</p>	<p>snyder 40:1</p> <p>social 14:19 16:14 17:19 44:16</p> <p>sole 38:3</p> <p>solely 20:18 44:9</p> <p>solutions 67:9</p> <p>sonya 2:25 67:3,8</p> <p>sorry 64:8</p> <p>source 8:5 24:18 25:16 29:22 30:1 31:2</p> <p>southern 27:1,16</p> <p>spanned 54:9</p> <p>specific 11:20 25:8</p> <p>specifically 47:24</p> <p>speculate 54:24</p> <p>split 35:6 52:13</p> <p>splitting 10:17</p> <p>st 1:14 3:13</p> <p>standard 20:7 22:14 40:15 41:6</p> <p>standards 13:15</p> <p>stanley 41:3</p> <p>starrett 26:16</p> <p>start 4:16 5:4 6:22 11:12,20 12:1,21 13:5 15:4 20:2,19 28:22 29:18 30:1 30:5,10,10,13,18 30:24 31:4 32:16 32:21,22 33:2,8,12 37:4 43:11,16,19 49:9 51:19,23</p> <p>start's 19:17</p> <p>started 15:14 37:20</p> <p>state 16:1 47:19</p> <p>stated 5:22 10:4 15:13 18:11 28:15 28:16 38:3</p>	<p>statement 7:24 9:20 24:16,19,22 24:25 25:8,12 27:7 28:4 33:18 36:5</p> <p>states 1:1,12 3:10 3:11 24:4,25 26:13 28:23 36:4 39:14 48:2 51:5</p> <p>stating 26:22 56:2</p> <p>statute 16:3,17,20</p> <p>statutory 47:9 54:13</p> <p>staying 22:3</p> <p>stipulation 16:2 20:16</p> <p>stop 23:18 26:14</p> <p>street 1:13 3:12</p> <p>stress 18:6,6 21:14 21:20,22 22:11 23:12,20 59:16</p> <p>stressful 16:22</p> <p>strict 11:15</p> <p>structures 13:19</p> <p>student 21:18 53:15 55:20 59:11</p> <p>subd 16:3</p> <p>subject 6:13 47:12</p> <p>submit 25:8 64:22</p> <p>substantially 12:4 25:1 36:6,8</p> <p>substitution 9:25</p> <p>suffer 49:5</p> <p>sufficient 37:12 62:5</p> <p>sufficiently 36:3</p> <p>suggest 37:7</p> <p>suite 67:11</p> <p>summary 61:12</p> <p>supplement 36:23</p>
--	--	--	--

[supplemented - usc]

Page 17

supplemented 62:8 support 14:16 15:23 28:9 56:16 supported 57:10 suppose 4:17 sure 57:23 surreptitiously 10:6	thing 34:4 60:21 64:9 things 59:24 60:24 62:3,6 63:17,18 64:4,5,19 think 63:16,18 65:2 thought 62:12 three 54:10 time 6:5,17 15:9 19:8 22:1,8,10 45:14 51:1 55:3 62:23 64:23,25 title 7:21,24 48:8 today 5:9,18,20,22 24:3 61:3,12,15,21 62:14 64:5 65:9 told 17:19 64:5 total 11:10 14:21 30:22 32:23 58:9 58:10 track 11:22 transcribed 2:25 transcript 15:16 16:10,10 17:1 18:20,21 19:10 20:7,22 33:22 35:7 49:25 67:4 transcripts 63:11 64:13 treasury 26:13 trickling 65:10 truck 26:14 true 15:7 19:3 56:4 59:9 67:4 trustee 3:11 4:7 5:23 7:10 8:16,25 9:6 10:12 11:21 12:24 13:17,21,25 14:9,13,16,23 15:2 15:18,19,24 16:13	17:2,7,13,24 18:8 18:23 19:4,12,19 20:1,10,17,23 21:3 21:7,11 22:25 23:23 28:8 29:2,6 29:21,25 30:2,7,12 31:10,14 32:8,14 32:19 34:6,17 35:8,14,18 37:6 40:21 47:5,22,24 48:16 49:4,8,13,17 50:2,8,14,23 51:5 51:8,17,21 52:1 53:12 54:16 56:11 56:17,23 57:3,25 58:16 59:20 61:4 62:3,7 trustee's 14:7 24:6 37:1 40:11 two 10:12 20:4 35:6 54:10 63:8 63:12,20 64:10,15 type 61:2 62:9,10 typical 45:12	39:15 40:10 47:5 47:22,23 48:16 49:4,8,13,17 50:2 50:8,14,23 51:5,8 51:17,21 52:1 53:12 54:16 56:11 56:16,23 57:3,25 61:4 62:3,6 u.s.c. 41:8 ultimately 60:23 understand 49:18 50:9 55:10,17 56:12 61:13,14,20 understanding 38:19 51:2 understands 57:23 61:15 understood 23:10 31:21 34:14 35:3 38:14 51:6,12 53:10,17 54:25 63:22,23 undue 59:14 unfit 38:9 unintentional 24:13 unique 60:15 62:1 unit 39:15 united 1:1,12 3:10 3:11 26:13 39:14 unknown 1:25 unlimited 22:18 unobtrusive 63:15 unpaid 31:4 unreasonable 39:5 unsophisticated 38:10,16 upcharge 38:7 43:21 44:1 usc 16:7,17 47:11 47:21 48:14 55:17
t			
t 41:4 67:1,1 take 19:8 22:12,21 22:24 23:14 29:13 44:23 46:1,6,23 taken 19:9 takes 35:8 talk 4:23 talking 4:19 5:15 tangents 64:3 tasks 45:21 technical 27:24 telephonically 3:8 3:15 tell 23:24 64:12 term 53:2 terms 12:3,5 48:14 50:5 51:3 53:1 54:3,6 testified 17:18 19:7 20:20 21:22 23:19 38:14 53:17 testify 18:5 54:20 testimony 53:9 64:22,23 thank 62:21,23 63:1,6 65:5,11,13 65:14 thanks 65:1 that's 50:23 there's 57:20			

[use - zero]

Page 18

use 10:18,25 48:20 uses 45:11 usually 42:21 utah 8:24 utilizing 21:8 42:24	want 7:5 60:9,13 62:20,24 63:7 wanted 23:12 64:4 64:8 warrant 24:11 39:3 waved 45:24 way 54:18 60:12 61:5 63:19 64:2 64:16 week 65:7 weeks 54:10 went 21:19 64:2 western 8:19 11:18 westlaw 8:23 10:1 35:21 43:24 whatsoever 27:25 william 1:22 willing 44:22 wishes 4:15 withdraw 9:25 witnesses 64:19 wjf 1:3 wondering 60:10 words 51:21 work 38:24 45:7 45:14 worth 45:9 wright 8:21 11:5 write 5:16 writing 60:10 written 7:4 34:1 48:9 wrong 23:24	year 8:1 years 14:17 20:4 yield 21:8 york 27:1,17
v		z
v 25:3 26:2,13,16 27:18 39:8,11,14 39:24 40:1,7,24 41:3,15,18,19,25 46:9,15,16,21,21 vacuum 54:21 value 8:8 15:20 18:3 30:21 39:17 41:10 various 42:17 51:12 60:21 vast 20:14 vergos 27:18 veritext 67:9 vermont 26:21 violate 47:7 53:20 violated 13:12 58:25 violations 27:24 virtual 54:21 virtually 20:11 vitiate 26:12 void 47:18 58:2 voided 12:19 37:15 38:21 58:24		z 39:24 zepecki 39:24,25 40:7 zero 10:18
w		
w 40:1 wage 16:16 wages 17:17 waive 51:14 waived 45:6,7 waiver 18:16 59:21		
	x	
	x 1:4,10 41:2 66:1	
	y	
	y 26:20 27:19 40:25 41:18	